Supreme Court, U. S.
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No. 80-336

IN THE

Supreme Court of the United States

JUDY ELIZABETH BRUBECK and
VIRGINIA CHRISTINE MARTIN,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal of the State of Florida, in and for the Second District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED[1]

1. Whether Lee County Ordinance 75-9 is violative of the First Amendment of the United States, as applied to Appellants in this case.

2. Whether Lee County Ordinance 75-9 is facially violative of the First Amendment of the Constitution of the United States.

3. Whether conflicting decisions among the lower federal courts and between state courts and the lower federal courts on the same point of law decided by this Court in *California v. LaRue,* 409 U.S. 109 (1972), mandates clarification by this Court.

[1]Appellants, without waiving their Fifth Amendment (due process) and Fourteenth Amendment (equal protection) claims, will not argue the substantiality of such federal claims in this jurisdictional statement, even though the Florida District Court of Appeal considered and expressly rejected such claim. Appellants reserve the right to raise such claims in their Brief on the merits of their claims in the event this Court accepts jurisdiction of this appeal.

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IN THE

Supreme Court of the United States

No.

JUDY ELIZABETH BRUBECK and
VIRGINIA CHRISTINE MARTIN,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal of the State of Florida, in and for the Second District

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JURISDICTIONAL STATEMENT

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN, the Appellants, appeal from the Final Judgment of the District Court of Appeal of Florida, Second District, dated June 4, 1980, denying Appellants' Motion for Writ of Common Law Certiorari and thus upholding the conviction of Appellants for violation of Lee County, Florida Ordinance 75-9 which bans nudity in bars and finding that the Ordinance is constitutional on its face and as applied to Appellants, and not violative of (a) Appellants' rights of free speech guaranteed by the First Amendment of the Constitution of the United States, (b) Appellants' rights of due process of law guaranteed by the Fifth and Fourteenth Amendments of the Constitution

of the United States, and (c) Appellants' rights of equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the District Court of Appeal, Second District of Florida, is reported at 384 So.2d 1378 (Fla.2d DCA 1980) (A-91). The decision of the Circuit Court of the Twentieth Judicial Circuit of Lee County, Florida, rendered in its appellate capacity, is reprinted in the appendix hereto (A-79-80). The Judgment and Sentences of the County Court (the trial court) in and for Lee County, Florida, dated June 4, 1979, and the Orders and Opinions of the County Court, which held Ordinance 75-9 constitutional, are also reprinted in the Appendix hereto (A-9-11, 75-76).

JURISDICTION

The judgment of the District Court of Appeal of Florida (the highest court of the State of Florida in which a decision could be had in this case) denying certiorari to review the Circuit Court's per curiam affirmance of the trial court's ruling that the Ordinance was constitutional, was entered on June 4, 1980 (A-91).

A Notice of Appeal to this Court was duly filed in the District Court of Appeal of Florida, Second District, on July 16, 1980 (A-92-93).

This appeal is being docketed in this Court within 90 days from the denial of the Appellants' Petition for Writ of Common Law Certiorari below. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). *See, Erznoznick v. City of Jacksonville,* 422 U.S. 205, 207, n.3 (1975)

["A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. 1257(2)"].

CONSTITUTIONAL PROVISIONS AND ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

Lee County Ordinance 75-9:

Section 1. LEGISLATIVE AUTHORIZATION.

This Ordinance is adopted pursuant to Article VIII, Section 1, under the State Constitution and Section 125.01(0) of the Florida Statutes.

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

(a) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

(b) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(A).

(c) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

(d) To suffer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

2.2. It shall be unlawful for any person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

Section 3. PENALTIES.

Any person who shall violate any section of this Ordinance shall be guilty of a misdemeanor punishable by a fine not to exceed $500.00 or imprisonment in the County Jail not to exceed sixty (60) days, or both.

Section 4. SEVERABILITY.

It is declared to be the legislative intent that, if any section, sub-section, sentence, clause or provision of this Ordinance is held invalid, the remainder of the Ordinance shall not be affected.

Section 5. EFFECTIVE DATE.

This Ordinance takes effect immediately upon receipt of the official acknowledgment from the Office of the

Secretary of State of Florida that this Ordinance has been filed with said Office.

DULY PASSED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, THIS 16TH DAY OF JU' Y, A.D., 1975.

ATTEST:	BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY,
SAL GERACI, CLERK	FLORIDA
By: /s/ _____	By: /s/ _____
Deputy Clerk	James M. Sweeney, Jr.
	Chairman

* * * *

RAISING THE FEDERAL QUESTION

The constitutionality of the Ordinance was first raised by the Appellants in the trial court by their respective Motions to Dismiss the Informations (A-5-8) filed against the Appellants.

In its Order and Or'nion, the trial court held that the Ordinance was constitutional on its face and as applied to Appellants under the First Amendment to the United States Constitution (A-9-11). Upon appeal of this ruling by the Appellants, the state intermediate appellate court (the Circuit Court in this instance) per curiam affirmed the ruling of the trial court without opinion (A-79-80).

The constitutional questions presented herein were reiterated by Appellants before the District Court of Appeal of Florida in their Petition for Common Law Writ of Certiorari (A-83-89). Appellants asserted that the state intermediate appellate court departed from the essential requirements of law and committed fundamental error in affirming the ruling of the trial court since the subject Or-

dinance is violative of, among other provisions, the First Amendment to the United States Constitution (A-83-89). The District Court of Appeal of Florida, after initially finding that such Petition demonstrated a preliminary basis for relief and ordering Appellee to respond to the Petition (A-90), denied certiorari (A-91). The District Court of appeal of Florida thus considered and expressly rejected these federal constitutional claims.

STATEMENT OF THE CASE

Appellant, VIRGINIA CHRISTINE MARTIN, is the manager and wife of the owner of Martin's Lounge, a business licensed to sell beer and wine in Lee County, Florida. Appellant, JUDY ELIZABETH BRUBECK, is an employee of Martin's Lounge, employed as a dancer for the purpose of entertaining the Lounge's customers. Appellants have been arrested and convicted of violating a local Ordinance banning semi-nude dancing in bars.

On July 16, 1975, Lee County Ordinance 75-9 (A-58-82) was enacted, banning, inter alia, the exposure of the female breast and buttocks in establishments serving alcoholic beverages in Lee County, Florida.

On or about July 28, 1975, Andy Martin, the owner and husband of Appellant, VIRGINIA CHRISTINE MARTIN, filed a suit for declaratory relief in the state trial court seeking to have the Ordinance declared unconstitutional. Although the trial court found the Ordinance to be unconstitutional on its face under the First Amendment, the Florida intermediate appellate court reversed such decision and the Florida Supreme Court affirmed such reversal.[2]

[2]*See, Board of County Com'rs. v. Dexterhouse,* 348 So.2d 916, (Fla.2d DCA 1977), affirmed in *Martin v. Board of Cty. Com'rs. of Lee Cty.*, 364 So.2d 449 (Fla.1978).

Thereafter, on December 18, 1979, such reversal was appealed to this Court, which refused to accept jurisdiction for want of a substantial federal question.[3]

On December 14, 1979, just prior to a stay of the Florida Supreme Court mandate pending the appeal to this Court in such case, Appellant, BRUBECK, was arrested while dancing in the lounge and charged by Information with violating Section 4-1(3) of the Ordinance, i.e., exposing her buttocks. Appellant, MARTIN, was charged by Information with violating Section 4-1(1) of the Ordinance, i.e., suffering or permitting a person to expose her buttocks while on the premises of the lounge (A-1-4).

On February 7, 1979, Appellants each filed in the trial court Motions to Dismiss (A-5-8) the Informations based upon various constitutional grounds, including the contention that the Ordinance was unconstitutional as applied to Appellants.

Hearings were held in the trial court on such Motions on April 2, 1979, and April 24, 1979 (A-9-11) whereat the tapes of the original County Commission hearing (A-45-74) concerning enactment of the Ordinance, and the depositions of the arresting officers who witnessed the alleged illegal conduct were introduced as evidence (A-23-26, 37-44). The tapes, material portions of which have been transcribed and made a part of the Appendix, (A-45-74) consisted of mostly citizens' views on the issue, and contained no evidence of illegal or immoral activities stemming from the dancing in Martin's Lounge. The deposition of the arresting officers revealed that Petitioner, BRUBECK, was clothed in a leotard, was dancing on a stage to music, unsnapped her leotard and raised it

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[3] *See, Martin v. Board of County Com'rs. of Lee Cty.*, 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979).

above her waist, which revealed only her buttocks since she was wearing a G-string under the leotard, that there was no physical contact between the dancer and patrons, or other employees, that there was no commotion caused by the dance, and that, as soon as the music ended, the dancer left the stage and dressed (A-30-35, 39-43).

The trial court thereafter entered its Order on April 30, 1979, denying such Motions (A-9-11).

On June 4, 1979, Appellants entered pleas of nolo contendere reserving the right to appeal the denial of Motion to Dismiss and were adjudged guilty and fined $43.05 as to Appellant, BRUBECK, and $211.00 as to Appellant, MARTIN (A-75-76).

Appeal of such conviction and denial of the Motions to Dismiss (A-9-11) was taken to the Circuit Court sitting in its appellate capacity. In such appeal, Appellants raised and argued the issues that the Ordinance was unconstitutional on its face and as applied to Petitioners under the free speech, due process, and equal protection clauses of the United States Constitution and the Florida Constitution.

On January 7, 1980, the Circuit Court entered a per curiam affirmance of the convictions of Appellants (A-79-80), rehearing denied on January 30, 1980 (A-81-82), from which affirmance Appellants sought a Writ of Common Law Certiorari in the District Court of Appeal of Florida, Second District (The "District Court").

On June 4, 1980, the District Court denied Appellant's Petition (A-91), from which decision Appellants bring this appeal. Notice of Appeal from such decision was filed to this Court on July 16, 1980 (A-92-93).

THE QUESTIONS ARE SUBSTANTIAL

The three questions presented to this Court are (1) whether an ordinance banning nudity or semi-nudity in bars may be constitutionally applied to a dancer performing a topless or bottomless dance, absent gross sexuality or any other aggravating circumstances; (2) whether an ordinance banning nudity or semi-nudity in a bar is facially constitutional absent Twenty-First Amendment powers and any rational basis for the enactment of the ordinance, and (3) whether lower federal courts and state court decisions misapplying or misinterpreting a decision of this Court concerning the constitutionality of laws banning nudity or semi-nudity in bars and conflicting with other lower federal decisions on the same point of law should be rectified by this Court. All three questions present substantial federal questions in this case, as will be shown below.

1. First Amendment Application Question:

The question of whether the Ordinance, as applied to Appellants under the facts of this case, is unconstitutional under the First Amendment is both novel and substantial.

The seminal case deciding the issue of whether states may constitutionally regulate activities in liquor establishments is *California v. LaRue,* 409 U.S. 109 (1972). Though deciding regulations which ban grossly sexual activities in bars were facially constitutional under the First Amendment, this Court foresaw that ". . . specific future applications of (the regulations) may engender concrete problems of constitutional dimension." *Id.*, 409 U.S. at 119, n.5. The issue presented herein poses precisely such a problem.

Unlike the *LaRue* case, *supra*, or the prior Florida state court decisions upholding the Ordinance,[4] all of which dealt solely with the facial validity of such laws, the question of the constitutionality of the application of such laws is one of first impression for this Court.

In this regard, it is important to emphasize that this case is not a rehash of *Dexterhouse, supra.* Again, *Dexterhouse* arose in the context of a suit for declaratory judgment, wherein the trial court held the Ordinance unconstitutional on its face without taking testimony or consideration of any evidence whatsoever. The County appealed such ruling and the only constitutional argument presented to the appellate court in *Dexterhouse* was whether or not the Ordinance was facially constitutional under the First Amendment.

The case at bar is wholly distinguishable from *Dexterhouse* for the following reasons:

(1) Appellants have been arrested and convicted of violating the Ordinance (A-75-76), whereas *Dexterhouse* involved no actual loss of personal freedom, but only the threat of criminal prosecution.

(2) The trial court in this case had the opportunity to review the tapes (A-18), of the County Commission public hearing on the ordinance held in order to determine if the Ordinance passed the "rational basis" test established by this Court in *LaRue, supra,* whereas the trial court and the appellate courts in *Dexterhouse* did not have the benefit of such tapes.

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[4] *Board of County Com'rs. v. Dexterhouse,* 348 So.2d 916 (Fla.2d DCA 1977), affirmed; *Martin v. Board of County Com'rs. of Lee Cty.*, 364 So.2d 449 (Fla.1978).

(3) The County Court in this case had the details of the activities of Appellant, BRUBECK, which led to Appellants' arrest, as set forth in the depositions of the arresting officers (A-23-36, 37-44). From such details, the County Court had an opportunity to determine the constitutionality of the Ordinance as applied to such facts, even if concurring that the Ordinance was facially constitutional, whereas in *Dexterhouse* the constitutional application of the Ordinance could not have been, and was not, an issue.

With these material distinctions in mind, it is also important to note that, as in *LaRue,* the future judicial review of an unconstitutional application of such laws was expressly reserved by the appellate court in *Dexterhouse,* 348 So.2d at 919. Likewise, the Florida Supreme Court in *Martin, supra,* (which affirmed *Dexterhouse,* and adopted the opinion of *Dexterhouse* as its own) held the opinion in *Dexterhouse* to apply only to the "scant facts" in the record of that case (364 So.2d at 445), *thereby* reserving the possibility for future consideration of both the facial and applicational constitutionality of the Ordinance under a different, and presumptively, more complete record.

The record in the case at bar is complete and mandates further consideration of the fundamental constitutional issues existing in the case at bar, all as fully set forth hereinafter.

The alleged criminal activities of Appellant, BRUBECK, as established by the depositions of the arresting officers, are as follows:

(a) Ms. Brubeck was dancing on a stage at the time of the alleged violation (A-29-30).

(b) Ms. Brubeck was wearing a black leotard similar to a one-piece bathing suit (A-39), or shorts with a tank top shirt (A-27).

(c) Ms. Brubeck was dancing to disco music and dancing a "disco type, rock dance." (A-28).

(d) As part of her dance, Ms. Brubeck unbuttoned her leotard and raised it above her waist (A-39), and was wearing a G-string under the leotard (A-39).

(e) Ms. Brubeck danced a few minutes in this manner until the music ended (A-39-40).

(f) After the music stopped, Ms. Brubeck left the stage (A-40) and went into the dressing room (A-40).

(g) During the dance, Ms. Brubeck would turn her back to the audience, place her hands on her knees and shake her buttocks (A-40-41).

(h) Thereafter, Ms. Brubeck and Ms. Martin were arrested (A-41-42).

(i) During the dance, Ms. Martin was behind the bar (A-42).

(j) Deputy Townsend was not offended by the dance (A-42).

(k) The dance did not cause any disturbance in the bar (A-41).

(l) No physical contact between Ms. Brubeck and members of the audience or other employees was testified to, nor were any other acts witnessed or complained of, except exposing the buttocks while dancing on a stage.

Quite clearly the above activities of Appellant, BRUBECK, do not begin to approach the status of gross sexuality, a status necessary before semi-nude dancing falls

from the protection afforded by the First Amendment and expressly recognized by this Court in *LaRue.*[5]

The question, of course, which this Court is being asked to answer is what type "show" merits such protection even in the face of statute prohibiting nudity or semi-nudity in bars.[6]

One of the few cases which answers this question is *Com v. Sees,* 373 N.W.2d 1151 (Mass.1978). Even though that case has no precedential value in the case at bar, the factual setting in that case mirrors that in the case at bar and the reasoning of the Massachusetts Supreme Court therein accurately reflects the activities contemplated for First Amendment protection by this Court in *LaRue.*

After finding that an ordinance banning exposure of the breasts and buttocks in a bar was unconstitutional on its face (because of the existence of Twenty-First Amendment powers, not present in this case), the court found the Ordinance unconstitutional as applied to the bar manager and dancer who was arrested for dancing to rock and roll music while clothed only in a G-string:

> The regulation of nudity on licensed premises, we have held, is not unconstitutional on its face. But, we are not here concerned with a topless waitress. (Citation omitted). Nor with the im-

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[5]"This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments." *Id.*, 409 U.S. at 118.

[6]The Federal District Court of Wisconsin has held that bar shows falling somewhere between Mary Poppins and Bacchanalian revelries still merit First Amendment protection, but did not identify any particular show or activity which would fall within the protected zone. *See, Escheat, Inc. v. Pierstorff,* 354 F.Supp. 1120 (W.D. Wis. 1973).

> position of nudity on an unsuspecting or unwilling person. (Citations omitted). The defendant employed or permitted a female dancer to perform to music on a dance floor for the entertainment of patrons. She did not mingle with other employees or with patrons, and there is no contention that the performance was obscene. (Citations omitted). Whatever the artistic merit of her performance, we do not think it could constitutionally be suppressed.
> *Id.*, at 1155-56.

Likewise, the Appellant, BRUBECK, was dancing on a stage to rock music, clad in no less than a G-string, exposing her buttocks but not her breasts. BRUBECK did not mingle with patrons, or employees, cause any commotion, nor was her performance obscene or offensive, all as fully shown by the testimony of the arresting officers (A-23-44). Surely, under these facts, *LaRue* cannot be said to proscribe the dance performed by Appellant, BRUBECK; to the contrary, the dance must fall within the zone of protection, as small as it may be, recognized by *LaRue*. Yet, even though the activities of Appellants were clothed with constitutional protection at the time of Appellants' arrest, the lower courts in this case stripped them of such protection, leaving Appellants more naked, figuratively speaking, than they ever were while dancing in the bar.

Under such circumstances, even assuming that the Ordinance is facially valid, the judgment of the District Court, upholding the application of the Ordinance to the activities of Appellant, BRUBECK, is clearly unconstitutional under the governing case law.

2. **First Amendment Facial Constitutionality Question.** While the question of the facial constitutionali-

ty of laws regulating certain forms of expression in liquor-serving establishments is not novel to the Court, the federal question, as presented herein, is most certainly substantial.

The *LaRue* case admittedly recognized the power of the several states to enact such laws *if* enacted under Twenty-First Amendment powers and *if* a "rational basis" exists for such regulations (i.e., gross sexuality which gives rise to or instigates other social evils); however, these two criteria form the limits on the power of the states to regulate such activities, as recognized by the federal courts in numerous post-*LaRue* decisions.[7]

While it is true that this Court refused jurisdiction[8] to review the *Martin* decision, *supra,* which upheld the facial validity of the subject Ordinance, the case at bar is before the Court in an entirely different posture. Only a "scant . . . record"[9] was before the Florida Supreme Court in *Martin,* while a complete record exists in this case, which fully substantiates Appellants' claim of no rationale basis and the lack of Twenty-First Amendment powers.

NO RATIONAL BASIS

It is quite obvious from reading *LaRue* that in order to determine if a rational basis exists for promulgation of the Ordinance, it is necessary to review the evidence which supported the conclusions contained in the Ordinance

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[7] *See,* Footnote 15, *infra.*

[8] 441 U.S. 918, 99 S.Ct. 2024, 60 L.Ed.2d 392 (1979).

[9] *Martin, supra,* 364 So.2d at 449.

(A-45-74)[10] The trial court below had an opportunity to review such evidence from the tapes of the hearings conducted by the County Commissioners for such purpose (A-12-22). Uncontradicted testimony was also introduced by Appellants at the hearings on the Motion to Dismiss that such Commission hearing was the only opportunity the Commissioners took to consider the effects of nude or semi-nude dancing on the community (A-19, 45-74).

A review of the tapes[11] discloses that no evidence whatsoever was introduced at the Commission hearing that would establish or support the conclusion that the entertainment offered at that time in the bar was, as stated in the Ordinance, directly related to, ". . . an increase in criminal activities, moral degradation and disturbances of the peace and good order of the community. . ." or that ". . . the concurrency of these activities is hazardous to the health and safety of those persons in attendance . . ." or that such activities tend ". . . to depreciate the value of adjoining property and harm the economic welfare of the community as a whole . . ." (A-45-74).

Time will not be taken herein to detail the contents of these tapes, which consist mostly of lay opinion concerning Christian values. Even the "evidence" proffered by the

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[10]"Based on the *evidence from the hearings* that it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general . . . , we do not think it can be said that the Department's conclusion in this respect was an irrational one." *LaRue*, 409 U.S. at 115 (e.s.).

[11]The Appendix contains only a portion of the three cassette tapes of the Commission hearing introduced evidence at the trial court. The typed transcript reflects the testimony of law enforcement officials as to the need for the Ordinance. The remaining portions of the tapes contain only statements of citizens either for or against the Ordinance. The tapes themselves will be included in the record on appeal if the Court accepts jurisdiction of this case.

Lee County Sheriff's Department (consisting of statistics on prostitution and a consequential increase in crime in New Orleans) was in no way rationally related to the conclusion drawn into the Ordinance. In fact, the logic and materiality of such evidence was even questioned by one of the Commissioners during the hearing (A-54, 61-62). Suffice it to say that no evidence of sexual misconduct, crimes related thereto or harm to patrons resulting therefrom was brought forward at the hearing. Nothing close to the "sordid" situation presented in the *LaRue* case existed in the two bars at which the Ordinance was aimed.

In short, any conclusions reached by the Commissioners were predicated upon unrelated statistics, fears and hypothesis, none of which can support the "rational basis" test demanded by the First Amendment.

NO TWENTY-FIRST AMENDMENT POWERS

As stated above, *LaRue* established the need for the existence of Twenty-First Amendment powers in order to give such regulations the "added presumption" of validity necessary to pass First Amendment challenge. These powers, as conferred on the states by the Amendment, must expressly be delegated to counties or municipalities before such powers vest in these governmental units. Without Twenty-First Amendment support, laws such as the Lee County Ordinance are unconstitutional on their face.[12]

As shown by the *Dexterhouse* decision, *supra*, Lee County had not been delegated the authority under the

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[12]*See, Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (7th Cir. 1975); *Birkenshaw v. Haley*, 409 F.Supp. 13, 19 (D.C. Mich. 1974); *500 Via De Palmas Corp. v. McCutcheon*, ___ F.Supp. ___ (S.D.Fla. 1979); verbal ruling reprinted herein at pages 99-100 of the Appendix.

Twenty-First Amendment to promulgate the Ordinance. In that case, the District Court of Appeals of Florida recognized this legislative impotency:

> Appellee correctly points out that the regulation and operation of establishments selling alcoholic beverages is a statute vested in the Division of Beverage which is granted *full power* or authority to adopt regulations to carry out the beverage laws of this state. Sections 561.02 and 561.11, Florida Statutes (1975). *Local control over establishments selling alcoholic beverages is limited to:* (1) hours of operation; (2) location of business; and (3) sanitary conditions. Section 562.45(2), Florida Statutes (1975), *Id.*, at 9 (e.s.).

The Court in *Dexterhouse* went on to hold that Lee County was, however, regulating conduct of individuals rather than regulation of the licensees themselves. Quite bluntly, such a holding is absurd in light of the myriad of federal cases, including *LaRue, supra,* and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), which hold that laws banning nude and semi-nude dancing are overbroad when enacted without the power of the Twenty-First Amendment.

Absent this power, the provisions of the Ordinance regulate on their face not only unprotected expression, but protected expression as well. Such broad regulation is not permissible under the First Amendment. *Gooding v. Wilson,* 405 U.S. 518, 522, 92 S.Ct. 1103, 31 L.Ed.2d 408; *Lewis v. New Orleans,* 415 U.S. 130, 134, 94 S.Ct. 970, 29 L.Ed.2d 214, 220, (1974); *Erznoznick v. City of Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

By upholding the Ordinance, the District Court, in effect, ruled that any female person entering a liquor

establishment in Lee County, Florida, forfeits all of her rights of free speech and expression as those rights might exist when dancing nude or semi-nude while in such establishments,[13] no matter what the circumstances are concerning this mode of expression. Such a ruling is erroneous even if the necessary criteria supported the enactment of the Ordinance, but in the total absence of these criteria, the ruling must fall from the sheer weight of the error.

3. Conflicting Application of LaRue Question.

Since this Court handed down its Opinion in *California v. LaRue, supra,* the many, varied, and, most importantly, conflicting decisions concerning the constitutionality of law (both facial and as applied) banning nude or semi-nude dancing in bars, not only serve to underscore the substantiality of the other federal questions raised herein, but constitute a substantial federal question in and of itself.[14]

Subsequent to *LaRue,* numerous federal courts have reaffirmed that topless and bottomless dancing enjoys First Amendment protection, even in bars, and have recognized the limited application of *LaRue* to the regula-

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[13]The Ordinance also has the far-reaching effect of criminalizing the exposure of the female breast in the bathroom of the bar, or when nursing an infant in a bar, or even the exposure of the infant's buttocks itself. These effects are more than far-reaching, they are patently overreaching. *Erznoznick v. City of Jacksonville, supra.*

[14]Conflicting lower federal court decisions and state court decisions have traditionally served as a basis for granting certiorari to resolve the question in conflict. *See, Lego v. Twomey,* 404 U.S. 477, 479, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); 422 U.S. 617, 624, 95 S.Ct. 2501, 45 L.Ed.2d 435 (1975); *Andresen v. State of Maryland,* 427 U.S. 463, 470, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

tion of gross sexuality under Twenty-First Amendment powers.[15]

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), this Court re-emphasized the protection nude dancing commands in bars even in the context of constitutionally enacted regulations which broadly encompass such activities on their face:

> Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in

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[15] *See, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Salem Inn, Inc. v. Frank*, 364 F.Supp. 478 (E.D.N.Y. 1975) aff'd 501 F.2d 21 (2d Cir. 1974); *Salem Inn, Inc. v. Frank*, 381 F.Supp. 859 (E.D.N.Y. 1975) aff'd 522 F.2d 1045 (2d Cir.1975); *Women's Liberation Union of Rhode Island v. Israel*, 512 F.2d 106 (1st Cir.1975); *Felix v. Young*, 536 F.2d 1126 (6th Cir.1976); *Richter v. Dept. of Alcoholic Beverage Control*, 559 S.2d 1168 (9th Cir.1977); *Escheat, Inc. v. Pierstorff*, 354 F.Supp. 1120 (W.D.Wisc.1973); *Peto v. Cook*, 364 F.Supp. 1 (S.D.Ohio 1973); aff'd 415 U.S. 943 (1974); *Manos v. City of Green Bay*, 372 F.Supp. 40 (E.D.Wisc.1974); *Birkenshaw v. Haley*, 409 F.Supp. 13 (E.D.Mich.1974); *Atwood v. Purcell*, 402 F.Supp. 231 (D.C.Ariz.1975); *Vintage Imp. Ltd. v. Joseph E. Seagram & Sons*, 409 F.Supp. 497 (E.D.Va.1976); *Saxe v. Healy*, 426 F.Supp. 543 (D.C.Conn.1977); *500 Via De Palmas Corp. v. McCutcheon*, ____ F. Supp. ____ (S.D. Fla. 1979), opinion attached at pages 99-100 of Appendix hereto, which struck down as facially unconstitutional (and as applied) a Boca Ration, Florida Ordinance (A-94-98) identical to that of the subject Lee County Ordinance (A-45-74); *Looking Kool-Jolly Trolly, Inc. v. City of Toledo*, ____ F.Supp. ____, (N.D. Ohio 1979), reprinted in the Appendix at pages 149-161; *Hughes v. Cristofane*, ____ F.Supp. ____, (D.C.Md.1980); reprinted in the Appendix at pages 166-175; and *Pure & Pretty, Inc. v. City of Riviera Beach, Florida*, ____ F.Supp. ____ (S.D.Fla.1980), reprinted at pages 186-188 of the Appendix; Cf., *Die Burg, Inc. v. Underhill*, 465 F.Supp. 1176 (M.D. Fla. 1980), relying on *Martin v. Board of County Commissioners of Lee County, supra*, as authority for denying a preliminary injunction against enforcement of a city ordinance identical to the subject Ordinance.

> *California v. LaRue*, 409 U.S. 109, 118, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.
> *Id.*, 422 U.S. at 532.

Nevertheless, most state courts, in spite of *LaRue* and *Doran*, have upheld laws banning semi-nude dancing regardless of the absence of any rational basis for the laws,[16] or the absence of properly delegated Twenty-First Amendment powers,[17] or have generally misconstrued the limited applicability of *LaRue*,[18] thus creating a sharp conflict between the federal and state court decisions on this matter.[19]

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[16]*City of Seattle v. Hinkley*, 517 P.2d 592 (Wash.1973); *Wayside Restaurant v. City of Virginia Beach*, 208 S.E.2d 51 (Va.1974); *Cheetah Enterprises, Inc. v. County of Lake*, 317 N.E.2d 129, (Ill.2d DCA 1974); *Longbridge Investment Co. v. Moore*, 533 P.2d 564 (C.A.Ariz.1975); *Wright v. Huxley*, 249 N.W.2d 672 (Iowa 1977).

[17]*Koppinger v. City of Fairmont*, 248 N.W.2d 708 (Minn.1976); *Martin v. Board of Cty.Com'rs. of Lee Cty.*, 364 So.2d 449 (Fla. 1978), affirming and adopting the opinion in *Board of Cty. Com'rs. of Lee Cty.*, 348 So.2d 916 (Fla.2d DCA 1977).

[18]*State v. Baysingr*, 397 N.E.2d 580 (Ind. 1979); *Three K.C. v. Richter*, 279 N.W.d2d 268 (Iowa 1979); *Bundo v. Liquor Control Com'n.*, 283 N.W.2d 860 (Mich.1979); *City of Seattle v. Buchanan*, 584 P.2d 918 (Wash.1978).

[19]This is not to say all state courts considering the issue have misconstrued or misapplied *LaRue;* some state courts, relying on *LaRue*, have found such laws unconstitutional as they effect semi-nude dancing. *See, State v. Gates*, 546 P.2d 52 (C.A.Ariz.1976); *Lucifer's Gate, Inc. v. Town of Buren*, 373 N.Y.S.2d 304 (N.Y.1975); *Bellanca v. New York State Liquor Authority*, ____ N.Y.S.2d ____ (N.Y.Ct.App.1980), at pages 176-181 of Appendix.

This conflict in decisions and underlying rationales draws to its sharpest focus in the State of Florida, where both state and federal courts have considered identical ordinances, yet reached diametrically opposed results.

Beginning with *Martin v. Board of Cty. Com'rs. of Lee Cty., supra,* which upheld an across the board ban on nudity in the bars, despite a recognized lack of Twenty-First Amendment powers in the county government, the issue was next addressed by a federal district court of the Southern District of Florida. In *500 Via De Palmas Corp. v. McCutcheon, supra,* (Pages 99-100 of the Appendix) a City of Boca Raton ordinance (A-94-98), identical to the Ordinance in the case at bar, was declared to be unconstitutional, facially and as applied, in its proscription of exposure of the female breast and the human buttocks in bars. In announcing its oral opinion (A-101-148), Federal District Judge Joe Eaton acknowledged that Florida counties and municipalities lacked Twenty-First Amendment authority to regulate these activities:

> Now in the first place, the answer to whether or not this is a Twenty-First Amendment case comes from the Supreme Court of Florida, where it is supposed to come from because in the cases where ordinances similar to this one have been upheld on their face, and I underline on their face, those cases in Florida have to do with the valid exercise of police power of either a county or a city.
>
> In Martin versus the Board of County Commissioners of Lee County, the Supreme Court of Florida said that this ordinance was within the county's police power (as opposed to being enacted under properly delegated Twenty-First

Amendment powers) Pages 115-116 of Appendix.

Such a decision was announced December 20, 1978, and judgment was entered January 15, 1979 (A-101-102). One month later the case of *Die Burg, Inc. v. Underhill,* 465 F.Supp. 1176 (M.D.Fla.1979) was decided. That case involved a suit to enjoin the enforcement of a City of Fort Myers ordinance, patterned after the Lee County Ordinance (Fort Myers is a municipality located within Lee County, Florida). In denying the plaintiff's motion for preliminary injunction, the federal district court in *Die Burg* relied upon *Martin* as authority for holding that the activities proscribed by the Ordinance were conduct, not expression, and therefore subject to regulation under general police powers. *Id.* at 1178. Obviously, such a holding flies directly in the face of the holding of a sister court in *500 Via De Palmas;* yet the conflict does not end here.

On June 25, 1980, the federal district court for the Southern District of Florida, through yet another judge, granted a motion for preliminary injunction prohibiting the enforcement of a City of Riviera Beach, Florida ordinance identical to the Boca Raton ordinance (A-94-98) invalidated by Judge Eaton. *Pure and Pretty, Inc. v. City of Riviera Beach, Florida,* ____ F.Supp. ____ (S.D.FLa. 1980), reprinted at pages 186-188 of Appendix.

Thus, the situation in the State of Florida at this time is that the Florida Supreme Court has sanctioned an ordinance regulating nudity in bars, despite an acknowledged absence of Twenty-First Amendment powers, which decision was immediately thereafter considered and rejected by a Florida federal district court. Just as quickly, following such pronouncement, a Florida federal court in

the Middle District refused to enjoin the enforcement of an identical ordinance, relying upon the erroneous Florida Supreme Court decision. Thereafter, still another Florida federal district court granted the relief denied by the Middle District Court concerning an identical ordinance in another city.

The bottom line of this crazy quilt of conflicting decisions is that the First Amendment, as it applies to topless dancing, has been butchered by the lower federal and state courts, resulting in hamburger for some, and steak Diane for others.

Decisions of this Court, let alone constitutional rights, should not be subjected to such treatment; and Appellants respectfully request the Court to accept jurisdiction over this Appeal to resolve this almost comical, though deplorable, situation.

In summary, the subject Ordinance is constitutionally defective on its face and as applied to Appellants under the facts of this case. This Court ruled in *LaRue* that, as to future problems concerning this area of regulation, there ". . . will be time enough to consider any such problems when they arise." 409 U.S. 119, n.5. Such problems have arisen time and again in both the lower federal courts and state courts with mixed and confused results; and time has all but run out for Appellants in their attempt to have this unconstitutional Ordinance overturned. It is respectfully suggested that now is the time for this Court to consider these problems and unravel the tangle of diverse decisions on these issues, for without review of this case by the Court, the constitutional protection afforded Appellants to partake in this form of expression, as limited as that protection may be, will for all intents and purposes cease to exist. It is of no benefit to citizens of this nation for this

Court to recognize constitutionally protected activities, but then refuse to enforce and protect them when repeatedly disallowed by lower federal and state courts.

Appellants respectfully submit the denial of any constitutionally protected activity, even if the activity merits ". . . only the barest minimum of . . ."[20] protection, constitutes a substantial federal question in a constitutionally governed nation. The total absence of Twenty-First Amendment powers, the total lack of evidence upon which to predicate a rationale basis for the Ordinance, and the unconstitutional application of the Ordinance to Appellants unequivocally establishes the substantiality of Appellants' First Amendment claims.

CONCLUSION

Based upon the reasons set forth hereinabove, this Court is respectfully requested to note probable jurisdiction of this Appeal.

Respectfully submitted,

STEVEN CARTA
SMITH, CARTA & RINGSMUTH
Post Office Box 2446
Fort Myers, Florida 33902
(813) 332-2686

By: _____
STEVEN CARTA
Counsel for Appellants

---

[20] *Doran v. Salem Inn, Inc., supra,* 422 U.S. at 932.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular United States Mail, postage prepaid, to The Honorable DAVID C. FRIEDMAN, Assistant State Attorney, Post Office Drawer 399, Fort Myers, Florida 33902, this _____day of _____, 1980.

/s/ _____
STEVEN CARTA
Member of the Bar of the
Supreme Court of the United States

APPENDIX

APPENDIX

IN THE COUNTY COURT, COUNTY OF LEE
STATE OF FLORIDA
For Lee County, in the year of our Lord
One Thousand Nine Hundred and Seventy-eight

STATE OF FLORIDA	)	*Information for Misdemeanor*
vs.	)	LEE COUNTY ORDINANCE NO. 75-9 SEC. 4-1 (3)
JUDY ELIZABETH BRUBECK	)	
	)	

IN the Name and by the Authority of the State of Florida:

ELLEN S. FRANCES, *Assistant State Attorney of The Twentieth Judicial Circuit of the State of Florida, in the County of Lee, under oath information makes that*

JUDY ELIZABETH BRUBECK

late of the County and State aforesaid, on the 14th *day of* December, *in the year of our Lord one thousand nine hundred and seventy-eight, in the County and State aforesaid did then and there unlawfully* expose to public view her genitals, pubic area, buttocks, anus, or anal cleft or cleavage while on the premises of a commercial establishment, located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises.

Contrary to the Statute in such case made and provided and against the peace and dignity of the State of Florida.

/s/ Ellen S. Frances
Assistant State Attorney,
Twentieth Judicial Circuit
State of Florida

State of Florida
County of Lee

Personally appeared before me ELLEN S. FRANCES, *Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, who being duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, and that this information is filed in good faith.*

Ellen S. Frances

Sworn to and subscribed before me this 21 *day of* December, 1978.

/s/ Judith E. Maghari
Notary Public, State of Florida at Large
My Commission Expires Aug. 17, 1982

Presented by the State Attorney and

filed Dec.27, 1978

COUNTY COURT

COUNTY OF LEE

Sal Geraci
Clerk, County Court
By D.A. Metz

STATE OF FLORIDA

Deputy Clerk

Joseph P. D'Alessandro
State Attorney

Case Number	*STATE OF FLORIDA*	*Information for Misdemeanor*
	vs.	
78C05703A,	JUDY ELIZABETH BRUBECK	LEE COUNTY ORDINANCE NO. 75-9 SEC 4-1(3)
Additional State Witnesses		*Court Disposition*

IN THE COUNTY COURT, COUNTY OF LEE
STATE OF FLORIDA
For Lee County, in the year of our Lord
One Thousand Nine Hundred and Seventy-eight

STATE OF FLORIDA	)	*Information for Misdemeanor*
vs.	)	Lee County Ordinance No. 75-9 Sec. 4-1 (1)
VIRGINIA CHRISTIAN MARTIN	)	STATUTE:
	)	

IN the Name and by the Authority of the State of Florida:

ELLEN S. FRANCES, *Assistant State Attorney of The Twentieth Judicial Circuit of the State of Florida, in the County of Lee, under oath information makes that*

VIRGINIA CHRISTIAN MARTIN

late of the County and State aforesaid, on the 14th *day of* December, *in the year of our Lord one thousand nine hundred and seventy-eight, in the County and State aforesaid did then and there* maintain, own or operate a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises and did unlawfully suffer or permit a person, while on the premises of said commercial establishment, to expose to public view her genitals, pubic area, buttocks, anus, or anal cleft or clevage.

Contrary to the Statute in such case made and provided and against the peace and dignity of the State of Florida.

/s/ Ellen S. Frances
Assistant State Attorney,
Twentieth Judicial Circuit
State of Florida

State of Florida
County of Lee

Personally appeared before me ELLEN S. FRANCES, *Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, who being duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, and that this information is filed in good faith.*

Ellen S. Frances

Sworn to and subscribed before me this 21st *day of* December, 1978.

/s/ Judith E. Maghari
Notary Public, State of Florida at Large
My Commission Expires Aug. 17, 1982

Presented by the State Attorney and

filed Dec.27, 1978

COUNTY COURT

COUNTY OF LEE

STATE OF FLORIDA

Sal Geraci
Clerk, County Court
By D.A. Metz

Deputy Clerk

Joseph P. D'Alessandro
State Attorney

Case Number	*STATE OF FLORIDA*	*Information for Misdemeanor*
	vs.	
_____	VIRGINIA CHRISTIAN MARTIN	78CO5703B

Additional State Witnesses *Court Disposition*

IN THE COUNTY COURT IN AND FOR
LEE COUNTY, FLORIDA

THE STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	CASE NO.
- vs -	:	78CO-5703A
	:	
JUDY ELIZABETH BRUBECK,	:	
	:	
Defendant.	:	
	:	

[Filed Feb 7 1979
Sal Geraci
Clerk, County Court
/s/ lm d.c.

MOTION TO DISMISS

THE DEFENDANT, pursuant to Florida Rules of Criminal Procedure 3.190(b)(c) moves to dismiss the Information filed in this cause and would state as reasons therefor, the following:

1. Defendant is charged with a violation of Lee County Ordinance 75-9.

2. Lee County Ordinance 75-9 is unconstitutional on its face in that it is vague and overbroad.

3. Lee County Ordinance 75-9 is unconstitutional as applied to the facts in this case.

4. Lee County Ordinance 75-9 restricts lawful exercise of constitutional rights without a rational basis for its enactment.

5. Lee County Ordinance 75-9 unconstitutionally violates Defendant's rights of free speech and free expres-

sion, contrary to Article 1, Section 4 of the Florida Constitution and the First Amendment of the United States Constitution.

6. Lee County Ordinance 75-9 denies Defendant due process of law, contrary to Article 1, Section 2 and 9 of the Florida Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

7. Lee County Ordinance 75-9 denies Defendant equal protection, contrary to the Fourteenth Amendment of the United States Constitution.

8. Lee County Ordinance 75-9 is an unreasonable exercise of the state's police powers in that it is arbitrary, capricious and unreasonable.

WHEREFORE, Defendant requests this Court to hold an evidentiary hearing to determine the issues presented herein and dismiss the Information against the Defendant.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion to Dismiss has been furnished by hand delivery to The Honorable ELLEN S. FRANCES, Assistant State Attorney, 2200 Main Street, Fort Myers, Florida, this 7th day of February, 1979.

Respectfully submitted,

SMITH & CARTA
Attorneys for Defendant
Post Office Box 2446
Fort Myers, Florida 33902

By: /s/ Wilbur C. Smith
WILBUR C. SMITH, III

IN THE COUNTY COURT IN AND FOR
LEE COUNTY, FLORIDA

THE STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	CASE NO.
- vs -	:	78CO-5703A
	:	
VIRGINIA CHRISTINE MARTIN,	:	
	:	
Defendant.	:	
	:	

[Filed Feb 7 1979
Sal Geraci
Clerk, County Court
/s/ lm d.c.

MOTION TO DISMISS

THE DEFENDANT, pursuant to Florida Rules of Criminal Procedure 3.190(b)(c) moves to dismiss the Information filed in this cause and would state as reasons therefor, the following:

1. Defendant is charged with a violation of Lee County Ordinance 75-9.

2. Lee County Ordinance 75-9 is unconstitutional on its face in that it is vague and overbroad.

3. Lee County Ordinance 75-9 is unconstitutional as applied to the facts in this case.

4. Lee County Ordinance 75-9 restricts lawful exercise of constitutional rights without a rational basis for its enactment.

5. Lee County Ordinance 75-9 unconstitutionally violates Defendant's rights of free speech and free expres-

sion, contrary to Article 1, Section 4 of the Florida Constitution and the First Amendment of the United States Constitution.

6. Lee County Ordinance 75-9 denies Defendant due process of law, contrary to Article 1, Section 2 and 9 of the Florida Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

7. Lee County Ordinance 75-9 denies Defendant equal protection, contrary to the Fourteenth Amendment of the United States Constitution.

8. Lee County Ordinance 75-9 is an unreasonable exercise of the state's police powers in that it is arbitrary, capricious and unreasonable.

WHEREFORE, Defendant requests this Court to hold an evidentiary hearing to determine the issues presented herein and dismiss the Information against the Defendant.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion to Dismiss has been furnished by hand delivery to The Honorable ELLEN S. FRANCES, Assistant State Attorney, 2200 Main Street, Fort Myers, Florida, this 7th day of February, 1979.

Respectfully submitted,

SMITH & CARTA
Attorneys for Defendant
Post Office Box 2446
Fort Myers, Florida 33902

By: /s/ Wilbur C. Smith
WILBUR C. SMITH, III

IN THE COUNTY COURT IN AND FOR
LEE COUNTY, FLORIDA

THE STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	CASE NO.
- vs -	:	78CO-5703A
	:	
JUDY ELIZABETH BRUBECK,	:	
	:	
Defendant.	:	
	:	

[Filed April 30 1979
Sal Geraci
Clerk, County Court
/s/ Harlin D.C.

ORDER AND OPINION

ORDER

THIS CAUSE having come on to be heard upon Defendant's Motion to Dismiss and the Court having heard the argument of counsel and the tapes of Lee County Commission meeting of July 17, 1975, wherein testimony was taken in order to determine the necessity for what has come to be known as Lee County Ordinance 75-9, and the Court being otherwise advised in the premises, the Court finds as follows:

-1-

Lee County Ordinance 75-9 is constitutional on its face and is not vague and overbroad.

-2-

Lee County Ordinance 75-9 is not unconstitutional as applied to the facts of this case as brought forth by counsel

for the Defense for the purpose of the hearing on the Motion to Dismiss.

-3-

Lee County Ordinance 75-9 does not restrict the lawful exercise of constitutional rights without a rational basis therefore.

-4-

Lee County Ordinance 75-9 does not violate the Defendant's right to free speech and expression contrary to Article 1, Section 4 of the Florida Constitution and the First Amendment of the U.S. Constitution.

-5-

Lee County Ordinance 75-9 does not deny the Defendant equal protection under the Fourteenth Amendment of the U.S. Constitution.

OPINION

The Court of last resort of each state is the final arbitor as to whether or not a statute conforms with the State Constitution. Liquor Store, Inc., et al v. Continental Distillors Corporation, 40 So.2d, 371 (1949).

The question of the constitutionality of this ordinance was decided by the Florida Supreme Court in Martin v. Board of County Commissioners of Lee County, 364 So.2d, 449 (1978). The decision in that case affirmed and adopted the decision of the Second District Court of Appeal. It has been argued that the Courts in the Martin case cited above decided the constitutional issues based on a Motion for Declaratory Judgment leaving no hard facts upon which to make a ruling. Counsel for the Defense cites the language of the Florida Supreme Court wherein it said,

> ". . . we interpret the opinion of the District Court of Appeal to apply only to the scant facts of this record . . . ." Id. Page 450

At this point, this Court feels the issues to be identical in this case as they were in the earlier cases and therefore the question has been resolved.

DONE AND ORDERED in Chambers in Fort Myers, Lee County, Florida, this 30 day of April, 1979.

/s/ William J. Nelson
William J. Nelson
Judge of County Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Opinion and Order has been furnished by United States Mail to Ellen Frances, Assistant State Attorney, Lee County Courthouse, Fort Myers, Florida, and to Steven Carta, P.O. Box 2446, Fort Myers, Florida, this 30 day of April, 1979.

/s/ William J. Nelson
William J. Nelson
Judge of County Court

IN THE COUNTY COURT IN AND FOR
LEE COUNTY, FLORIDA.

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	CASE NUMBERS
vs.	)	78-CO5703-A
	)	78-CO5703-B
JUDY ELIZABETH BRUBECK,	)	
VIRGINIA CHRISTINE MARTIN,	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

Before the Honorable William J. Nelson, Judge of said Court, at a hearing in the above-styled action held in the Lee County Courthouse Annex, Fort Myers, Florida, on April 24, 1979.

APPEARANCES:

MS. ELLEN FRANCES, Assistant State Attorney, 20th Judicial Circuit of Florida, Fort Myers, Florida; appeared for the Plaintiff.

STEVEN W. CARTA, Attorney at Law, of the Law Firm of Smith, Johnson, Carta & Mockler, Fort Myers, Florida; appeared for the Defendants.

FILED
Jul 19 1978
SAL GERACI
CLERK COUNTY COURT
By /s/ Moreau d.c.

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Betty LaCoste	4	6		
James Humphey	9			

EXHIBITS

NUMBER	DESCRIPTION	IDENTIFICATION	IN EVIDENCE
Defendants Exhibit Dated 7/16/75	three cassette tapes	7	

THE COURT: You may proceed.

MR. CARTA: Your Honor, we are here today on a continuation of the hearing on a Motion to Dismiss, filed in this case by the Defendants, Brubeck and Martin.

I don't have both the case numbers if you want to get them on the record.

THE COURT: Martin case is — I don't recognize those numbers with the clerks office, we have now I can't be sure that it's right; 78CO5703-B, is what it says. I never heard of that case number before.

MS. FRANCES: 5703-B, is right.

THE COURT: And the other one is 78CO5703-A, which is the Brubeck case.

Yes, this is a continuation.

MR. CARTA: And the purpose of this hearing primarily, Your Honor, is to introduce the tapes of the meeting that the Board of Commissioners of Lee County; which was held on July 16, 1975; regarding the adopting, passage of Lee County Ordinance 75-9.

In that regard I have two individuals to give very brief testimony to you in reference to that date.

THE COURT: Would the witnesses please raise your right hand.

(Thereupon, both witnesses were sworn at this point) Thereupon,

BETTY LACOSTE,

a witness, called and duly sworn for and in behalf of the Defendants, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTA:

Q Mrs. LaCoste, state your name please.

A Betty LaCoste.

Q What is your address?

A 2215 Clubhouse Road, North Fort Myers.

Q What is your occupation?

A I am clerk for Mr. Garaci, Sal Garaci, Clerk of the Circuit Court.

Q Of Lee County?

A Yes.

Q What department do you work in?

A Minutes Department.

Q What is your function in that department?

A We take the records of the Board of County Commissioners meeting and transcribe them.

Q In that department, are all the tapes of prior meetings of the Lee County Board of Commissioners accepted and maintained in that office?

A Yes. But I don't know the exact year. I think it's '72 , May of '72 or something like that, from that point forward.

Q And they – tell the Court how they are stored as far as safety?

They are locked in file cabinets nightly.

Q Only authorized personnel have access to them?

A Oh, yes sir.

Q In regard to the minutes of the meeting of the Board of Lee County Commissioners of July 16, 1975. Have you had occasion in the past few weeks to make copies of those tapes regarding, from the original tapes in your custody?

A Yes, sir.

Q Have you those tapes with you at this time?

A Yes.

Q Could we see them please. Could you explain to the Court what procedure you used in making these tapes?

A With regard to the o iginal tape that was taken at the meeting, it was put on to another cassette machine, and the original tape is maintained in our office.

Q All right. Do these contain the Board of Commissioners meeting of July 16, 1975; pertaining to Ordinance 75-97.

A Yes, sir.

Q Since you have made these records, have they been in possession or control of anyone but yourself?

A No.

Q Have there been any alterations, changes to any part of these tapes since you made the tapes?

A No, sir.

Q Have you had continuous control since you made them from the original?

A Yes, sir.

MR. CARTA: Your Honor, I would like to introduce these.

THE COURT: You may cross examine with regard to the making of the copies of this tapes, if you care to or state any objection.

CROSS EXAMINATION

BY MS. FRANCES:

Q Is it Mrs. LaCoste?

A Yes, ma'am.

Q Tell me if my understanding is correct. You have only made copies of the tapes and the original is in a locked file in the clerks office?

A This is a recording from that, yes ma'am.

Q Are you solely responsible for the keeping of the tape recordings of the County Commissioners meeting?

A Solely, did you say?

Q Yes, ma'am.

A In what respect? I don't think I understand.

Q Who would be responsible for the keeping of the records?

A Our office.

Q And your office specifically was in control over the tapes made at the County Commission meeting, specifically on the date of July 16, 1975?

A I wasn't employed with Mr. Geraci at that time.

Q I am still – I think it's my understanding –

A I am losing you in the specifics.

Q What is your capacity regarding the keeping or control over the past tapes made of the Board of County Commissioners, specifically the date of July 16, 1975?

Is it your function or would it be someone else's to keep and preserve those tapes?

A That's my function in addition to others.

MR. FRANCES: I can't think of anything further.

MR. CARTA: Your Honor, at this time I would introduce these three cassette's as Defendants Exhibits.

We have had other Exhibits. I don't remember whatever number it's suppose to be.

THE COURT: I don't recall either. Any objection?

MS. FRANCES: Your Honor, it's still a persons, Mrs. LaCosta. There has been no predicate laid that the original, that she has control of or in fact factual exact tape recordings of Board of County Commissioners meeting at that time.

I would also renew my objection on prior grounds of irrelevancy and immateriality and that this Court should not question the wisdom of legislative body.

THE COURT: Mrs. LaCoste, were those tapes the original of which were supposedly the tapes of the meeting of July 16, 1975; were they exact?

THE WITNESS: It was a public hearing at a regular meeting, from what I understand, and as I said, I wasn't employed – it's on a reel.

That was a public hearing held during that time. The tapes that you have are an exact duplicate of the complete hearing pertaining to that ordinance.

THE COURT: Are these casettes true and correct copies of the real ones made on July 16, 1975?

THE WITNESS: Yes, they are.

THE COURT: Your objection is noted, I will admit Defendant's Exhibit. I am not sure – let the record reflect that this is a composite of three tapes.

MR. CARTA: They are marked any way Your Honor.

THE COURT: I ought to have a clerk here.

MR. CARTA: They are marked.

THE COURT: Each tape is identified by the dates, 7/16/75 side one; 7/16/75 side two; 7/16/75 side three; 7/16/75 side four and side five.

One and two are contained on one tape. Side three is on another tape and side four and five are on a third tape.

They are secondly identified for the purpose of any other procedure.

MR. CARTA: I next would like to call Jim Humphrey Thereupon,

JAMES HUMPHREY,

a witness having been previously sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTA:

Q State your name and address please.

A James T. Humphrey, 2216 Main Street, Fort Myers, Florida.

Q What is your occupation?

A I am an attorney in private practice.

THE COURT: Get me a clerk.

BY MR. CARTA: (Cont'g.)

Q Have you ever been employed by Lee County, Florida?

A Yes, I have. I was employed as the County Attorney for Lee County.

Q What period of time were you the County Attorney of Lee County, Florida?

A I was employed as County Attorney in October of 1973 and served continuously until the end of September of 1977.

Q All right. During your employment as County Attorney did you have an occasion to be involved with the proration and propagation of Lee County Ordinance 75-9; commonly known as the Lee County Topless Ordinance?

A Yes, I did. It was prepared by me, actually under my supervision.

I was responsible for the final, in its presentation to the Board of County Commissioners.

Q Okay. In your capacity as County Attorney, during that period of time was it also your duty to advise the Lee County Board of Commissioners as to their legal requirements to pass such an ordinance?

A Yes.

Q Was a public – were any public hearings held in connection with the passage of this ordinance?

A Yes, to my knowledge there was one public hearing held after advertisement in the newspaper.

According to the statute a Board of County Commissioners must notify the public if they are going to conduct a public hearing.

I could not tell you the exact date, but I know they did have one, and to my memory, it was only one public hearing.

Q All right. Could you tell, did you advise the Board of County Commissioners at the time what the purpose of that public hearing was?

A Yes, it was customary procedure to outline to them the title of the ordinance. Basically the contents of the ordinance and tell them the purpose and to generally outline what I felt their responsibility was, as to taking any testimony or what they should consider prior to adoption of an ordinance. If those questions were relevant.

Q In the passage of an ordinance of this type, was it necessary to take testimony concerning any matters, as per the necessity of the ordinance?

A As I recall, to the best of my memory, in doing the research, preparation for the hearing on this particular ordinance –

MS. FRANCES: I object, Your Honor. I object at this point, perhaps I should ask for a continuing objection as to anything regarding what the County Attorney advised the Board of County Commissioners on the same grounds I objected to before, that this Court is a judicial body and shouldn't question the wisdom of the County Commissioners as a legislative body.

THE COURT: Overruled.

THE WITNESS: May she read back that question?

THE COURT: Yes.

(Thereupon, the Court Reporter read back the question referred to.)

A (Cont'g.) Yes, to the best of my memory. To refresh my memory as to that particular ordinance, in presenting the ordinance to the Board of County Commissioners I always outlined such testimony for consideration that I felt they should pay particular attention to in consideration of this ordinance; as to whether it should be adopted or not.

Q And at that hearing was testimony from various persons from the community presented?

A To the best of my memory, yes. We had numerous witnesses that spoke, including law enforcement officials.

Q At the conclusion of that hearing, was the ordinance passed?

A. Yes, it was.

Q To the best of your knowledge, was that the only hearing and the only opportunity the Board of Commissioners had to consider and accept and hear any evidence concerning the ordinance or need for the ordinance?

A I feel certain – I am sure that was the only hearing of which they took any testimony or conducted a public hearing on that ordinance.

MR. CARTA: No further questions.

MS. FRANCES: No questions.

MR. CARTA: May they be excused?

THE COURT: You are excused. Thank you very much.

(Thereupon the witnesses were excused at this point.)

MR. CARTA: Your Honor, at this point in time unless the Court decides to listen to the tapes, now I don't think it's absolutely necessary, unless Your Honor wishes to listen to the tapes on your own time.

I would like to make a brief argument. I intended at the last hearing to give a brief argument as to the ramifications of what the tapes do say and their connection to this particular case.

THE COURT: Let the record reflect that I will listen to the tapes on my own time and – when are these cases set for trial?

MR. CARTA: They are not set for trial.

THE COURT: Okay. I will render a decision based on your argument and hearing of the tapes at a time later than today, because, I have to have the opportunity to listen to them.

MR. CARTA: All right. Let me start my argument by prefacing it.

THE COURT: Let me stop you before you start. Who was the clerk on the other – we have had some other tapes for identification introduced. There must be some minutes somewhere.

THE CLERK: I don't know Judge. I have no idea.

MR. CARTA: It was an older lady last time from my recollection.

THE CLERK: Who is this one, what's the case?

MS. FRANCES: It may have been –

MR. CARTA: Brubeck and Martin.

THE COURT: You need to find out from her where the minutes are so I can determine where the rest of the documents that were introduced are, because I don't remember what they were. I have the court's files but I don't see any in the minutes.

MR. CARTA: We had those other tapes, I think you took them.

THE COURT: I didn't take them.

MS. FRANCES: You did, Your Honor.

THE COURT: If I have them they are on my desk. I don't recall seeing them, because I haven't listened to them. I'll look on the desk.

MR. CARTA: The clerk may have –

THE COURT: Let's proceed then.

MR. CARTA: I will preface my remark by telling the Court, what you already know from the U.S. Supreme Court, in the case of Martin vs. Board of County Commissioners, dismissed the appeal that was filed there yesterday.

I do not feel this in anyway affects the status of this case for this reason. Again, if you read the Florida Supreme Court's opinion in the Martin case * * *

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CRIMINAL ACTION

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	78 CO5703A
	)	
JUDY ELIZABETH BRUBECK,	)	
	)	
Defendant,	)	
	)	

DEPOSITION OF LYNN KISER

Upon oral examination, taken by counsel for the Defendant, on the 6th day of February, 1979, at the offices of Associated Reporters, Inc., 2275 Main Street, Fort Myers, Florida, before Ozalena W. Miller, Notary Public, State of Florida at Large.

APPEARANCES:

ELLEN S. FRANCES, Assistant State Attorney, 20th Judicial Circuit, State of Florida, appeared for the Plaintiff.

WILBUR C. SMITH, III, Attorney at Law, of the Law Firm of Smith & Carta, Fort Myers, Florida, appeared for the Defendant.

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Thereupon,

LYNN KISER

was called as a witness by the Defendant, was duly sworn, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Will you state your name and address — or name and occupation, rather.

A Agent Lynn Kiser, Lee County Sheriff's Department.

Q Miss Kiser, were you involved in the arrest of Christine Martin and Brubeck on or about December 14th, 1978?

A Yes, I was.

Q And was this in Martin's Lounge?

A Yes, it was.

Q What time did you first go to Martin's Lounge that evening?

A I believe — I can't be completely sure, but I believe it was around 9:30, quarter to ten.

Q Was that the first time you had been in Martin's Lounge?

A No, it wasn't.

Q How many times had you been there on previous occasions?

A Two or three times.

Q In reference to this date how many days previous, approximately? Was it a week or a month or —?

A Probably a couple of months.

Q When you had gone there before, was it pursuant to your duties with the Sheriff's Department?

A Yes, it was.

Q Now, you say you went at approximately 9:30?

A Uh, huh.

Q Had you been there any earlier time that day?

A No, I had not.

Q Who did you go to the lounge with?

A It was one of our officers.

Q Mike Townsend?

A Yes.

Q Who assigned you to that detail that evening?

A Captain Yhal.

Q And what instructions did he give you?

A It was to check for violations of the new Lee County ordinance that had been put into effect.

Q What was your understanding of the ordinance, what would be a violation of the ordinance?

A Well, I reviewed the whole ordinance and it covered quite a few areas. They could not be topless and they could not expose their buttocks, basically.

Q Okay. When you entered the lounge, did you go in with Mr. Townsend?

A Yes, I did.

Q Did you enter the lounge appearing to be a couple, or did you go in and split up once you entered?

A We sat together.

Q You sat together. Were any reporters from the News-Press with you?

A No.

Q Were you aware that any reporters from the News-Press were present?

A I was after a while. I didn't notice them right at first, but later on I did.

Q To the best of your knowledge they were not part of your investigative unit?

A No, sir, they weren't.

Q And you didn't know they were going to be there?

A (nodding negatively.) I had a feeling that one of the ladies would be there from the News-Press. I was told she might be there.

Q Had you ever talked to her yourself?

A No, sir.

Q Once you sat down — strike that.

Did you previous to that notice either Mrs. Martin or Miss Brubeck?

A No.

Q Had never seen them before?

A No.

Q Once you sat down, what did you observe happening in the club?

A I believe there were three dancers that night. We watched one dancer and then observed Miss Brubeck get up on stage and dance.

Q Okay. You say when you came in the club and first sat down someone other than Miss Brubeck was dancing, or did this person start dancing after you sat down?

A There was someone else dancing at the time, I believe.

Q Do you remember this person's name?

A No, sir. I don't know any of the girls by name.

Q Was any music being played while she was dancing?

A Yes.

Q Do you know whether it was coming from a juke box, a live band, a record player, a stereo, a cassette?

A It was a juke box.

Q Do you remember any of the songs that were being played?

A No.

Q Do you recall the type of music that was being played? For example, was it bluegrass, country and western, rock and roll, disco?

A It was rock and roll and disco, mainly.

Q Did one song play right after another?

A Yes. I believe the girls picked their own songs. They has access to the juke box.

Q What type of dance was the first dancer that you oberved doing? What was she doing?

A Well, I don't really know what you want, what do you mean, what was she doing?

Q She was on the stage?

A Yes.

Q Was she dancing?

A Yes.

Q Okay. What type of motions was she making to do the dance?

A Well, the dancing is all basically the lewd and lascivious dancing, but she was not in violation.

Q What is lewd and lascivious dancing?

A A lot of hip action, a lot of spreading the legs, a lot of bending over and what not.

Q What was she wearing?

A I believe – if it's the girl I'm thinking about, she had on a dress.

Q A dress?

A Yes.

Q How long a dress? Was it knee length or ankle length?

A Now, we're not talking about Miss Brubeck?

Q Right.

A I'm talking about one of the other girls. She had a dress, I guess about down to her calves, and if it was, the other girl, she had on – maybe it was just a pair of shorts and a shirt, tank top type shirt.

Q Did she have a partner that was dancing with her, either a male or female?

A No.

Q So she was dancing by herself?

A Uh, huh.

Q And did members of the audience seem to be watching what she was doing?

A Yes.

Q And did you notice that she would make certain gestures and the audience would respond by either applauding or some other type of expression?

A Yes. By tipping with money.

Q Where did she put the money? This is the first girl I'm talking about.

A I can't say for sure. A lot of times they would usually just stick it down the front of their shirt or whatever.

Q Could you categorize the type of dance she was doing any more definitely than you have? In other words, I don't really know all the dances today, but compare it to disco dancing as opposed to some type of dancing that would be just regular rock and roll dancing or the old – well, one of those two. Was it one of those two types of dance?

A No, it's not. It's basically in a class all of its own.

Q Which would be what?

A I don't know what you would call it. It's just not your normal everyday dance. You wouldn't walk into a bar at night and see anyone dancing like this.

Q Okay. Have you ever seen anyone dancing like this before? Performers on a stage?

A Yes.

Q Where would this have been?

A In a topless lounge.

Q And this was as part of your duties or was this on your own private time?

A I had seen them on occasion on my own private time, and on duty.

Q Where had you – you had gone to topless lounges when you weren't working, you've done that in the past?

A Once or twice.

Q And where was this?

Q This was in Gainesville, Florida.

Q You went there for an evening?

A To see what it was like. (Nodding affirmatively.)

Q They were performing a similar type dance in Gainesville as they were here?

A Yes.

Q And how many times did you go to this type of place in Gainesville?

A Once, twice at the most.

Q Okay. Now, on this particular evening when you saw this first girl dancing, what was your — what was your personal feeling about the dance that she was doing? Did it cause you to become very upset and emotionally upset because of what she was doing or was it you were just there and doing your job and you had no opinion, really?

A I was there doing my job, looking for violations.

Q Okay. Seeing this girl dancing on the stage didn't cause you to become emotionally upset yourself?

A No, it did not.

Q And it didn't offend you?

A It's very offensive, yes.

Q In what way is it offensive?

A Well, I personally don't enjoy sitting there and watching that type of dance.

Q Have you found that through your experiences that there are people who do enjoy watching that type of dance?

A Very much so.

Q Okay. And mostly men, sometimes women enjoy that type of dancing?

A Uh, huh.

Q And now the next performer was Judy Brubeck, or did Judy Brubeck eventually come on the stage?

A Yes, she did.

Q What was she wearing?

A She had on a black shirt and – looked to be a black pair of underwear is what it appeared to be, when she first got on.

Q And how long was this shirt?

A It came just – almost to the top of the thigh.

Q So it extended below the underwear that she was wearing?

A It wasn't below , it was probably about – just a little below the top.

Q Okay. Were these garments transparent?

A No, they were not.

Q And I assume she put money in the juke box?

A Yes.

Q And was this the same type of music the other girls had been dancing to or was it different?

A Basically the same, rock and roll.

Q You don't remember any of the songs, do you?

Q. No.

Q In what manner did she perform her dance, what was she doing?

A Well, basically the same type of dance that the other girls do except for Miss Brubeck bends over quite a bit more and shakes her rear and in front of the audience quite a bit more.

Q She would turn away from the audience so that her back would be to the audience?

A Uh, huh.

Q And then she would bend over and she would shake her butt?

A Uh, huh.

Q How long did she dance before you decided – well, how long did you observe her dance?

A The whole time she was performing.

Q How long was that?

A I believe it was two songs that she stayed up there.

Q And when she finished, what happened?

A Well, nothing, really. She just got off the stage and went about her business. And then the next dancer came on.

Q Who was the next dancer, do you know?

A I can't remember the other two girls, which order they were dancing.

Q Okay. Now, when Miss Brubeck – strike that.

When was it that you observed her buttocks being exposed?

A I believe it was during the first dance, about half way through the dance. She was fine at first until she pulled her shirt up and – I don't know – she had on a G-string, and it covered her pubic area, and the top, the string went around the back, and that was it.

Q There was no material covering her buttocks at all?

A None whatsoever.

Q Did she turn around with her shirt pulled up?

A Yes, she did.

Q So that her entire buttocks were exposed?

A Yes, she did.

Q Did there seem to be any different reaction from the crowd when she did that than there had been to any of the other parts of the dance?

A Oh, yes.

Q What happened?

A Well, they just seemed to enjoy it a little more by clapping or yelling out loud and whistling, what not.

Q Other than their doing that, did it cause any breaking of tables or fighting to break out?

A No.

Q How many people were in there, by the way, approximately?

A I'd say approximately twenty to twenty-five.

Q And when she exposed her buttocks by pulling her shirt up, did she shake her butt at that time?

A Well, I believe the first time she pulled it up she was just what they call flashing. She would just pull it up for a second and pull it back down. And I would not consider that a violation because she didn't keep her shirt up long enough to have any type of effect. And finally she just pulled it up and left it up and finished her dance.

Q How long did she dance with her buttocks completely exposed to the audience?

A I can't be sure.

Q Would it be more than a minute?

A Yes.

Q But less than five minutes?

A Yes.

Q Did it offend you to see her buttocks exposed in this way?

A Yes.

Q Did it – to what extent did it offend you? I mean, were you unable to continue looking at her or did it cause you to become ill or did you just think, "That's gross"?

A Just the thought of it was not very appealing.

Q Have you ever been in a bar where someone exposed their buttocks previously when you were not on duty?

A Yes.

Q And how many times?

A Once or twice at the most.

QAnd that was in Gainesville?

A Yes.

Q Okay. In what way did you conclude that her buttocks were exposed in a lewd manner? And by that question I mean is your conclusion based simply upon the fact that it was exposed or something that she did while it was exposed?

A Basically just the exposure.

Q She didn't do anything outrageous while it was exposed?

A Well, she was, like I said, turning her back to the audience and bending over and moving quite close to the patrons and shaking her buttocks, but basically just the exposure was in violation.

Q Okay. Now, in regards to Mrs. Martin, what was she doing during the time that Miss Brubeck was dancing?

A Just her usual duties as manager. She was tending bar, serving drinks, and whatever.

Q Now, specifically during the time that Miss Brubeck was dancing did you observe Mrs. Martin doing anything, or were you watching Miss Brubeck the whole time?

A I was watching both, just the whole place in general.

Q Can you specifically recall seeing Mrs. Martin any time during the Brubeck act?

A Yes.

Q What was she doing?

A She was behind the bar.

Q Did you see her serve any drinks during that dance or beers, whatever they serve?

A The waitresses would usually get their own or come up and give her the money or tell her what they wanted. She didn't serve patrons drinks, actually; she would just get it ready for the waitresses. But if I can recall a specific, no I can't.

Q So you don't recall her specifically giving any beverages or anything to waitresses or patrons during the Brubeck performance?

A I know that she did because she was there the whole time. She didn't leave behind the bar. she was constantly serving for the waitresses, but I cannot recall an actual specific, you know, drink that she served.

Q Okay. So you can't in your memory specifically remember her serving a drink during the performance?

A To a specific person, no.

Q Or to a specific waitress?

A No.

Q Did you know that she was Christine Martin?

A No.

Q Or Virginia Martin?

A (Nodding negatively.)

Q You didn't know who she was?

A (Nodding negatively.)

Q Who arrested her, you or Mr. Townsend?

A I advised both of the ladies they were under arrest.

Q Did either of them make any type of statement to you?

A Well, Mrs. Martin wasn't very happy with the idea, and she was complaining about it.

Q How did you find out that she was Mrs. Martin?

A Well, after I had decided that Miss Brubeck was going to be arrested I advised my captain, who was waiting outside as backup, of the situation, and when he came in he knew the lady to be Mrs. Martin.

Q Did she make any statements to you that she was the co-owner or that she was the operator or the person in charge that night?

A Yes, she did.

Q When was this?

A This was right after I advised her she was under arrest. She stated she was the manager at that time and she would have to call Mr. Martin to get him to come out and relieve her.

Q Had you advised her of her rights at this point?

A No, sir.

Q You told her that you were going to have to place her under arrest, and then what did you say to her?

A Nothing.

Q Why didn't you go ahead at that point and advise her of her rights?

A Well, she immediately started talking about having to get someone to come down and relieve her, and from then on she just – she kept talking. She was very upset.

Q Did you ask her to be quiet?

A No, I did not.

Q Who was with you when you arrested her?

A Deputy Townsend was there and Captain Yahl and Deputy Bostick, and one other person. I don't recall who it was. It was another deputy.

Q Okay. Did Miss Brubeck make any statements to you that you recall?

A She asked me what she was being arrested for, and I told her that she was being arrested for exposure of her buttocks in violation of the new Lee County ordinance. And she replied, "You mean I showed my ass?"

MR. SMITH: Okay. Those are all the questions I have. Do you have anything?

MS. FRANCES: I don't have anything.

MR. SMITH: Do you want to come back and read this when it's typed or would you like to waive reading and signing?

THE WITNESS: I'll waive it.

MR. SMITH: Okay. That's all.

(Deposition concluded.)

STATE OF FLORIDA)

COUNTY OF LEE)

I, Ozalena W. Miller, CSR, RPR, Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing deposition of LYNN KISER was taken before me, in the cause, at the time and place, and in the presence of counsel, as stated in the caption hereto, at Page 1 hereof; that before giving her deposition said witness was duly sworn by me to testify the truth, the whole truth, and nothing but the truth; that the foregoing typewritten transcription, consisting of pages numbered 1 to 18, inclusive, is a true record of my stenographic notes of the testimony of said witness and of all proceedings had at the session at which said deposition was taken.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, this the 9th day of February, 1979.

/s/ Ozalene W. Miller
Ozalena W. Miller, Notary Public,
State of Florida at Large.

My commission expires: 2/20/82

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	78 CO5703A
	)	
JUDY ELIZABETH BRUBECK,	)	
	)	
Defendant.	)	

DEPOSITION OF MICHAEL TOWNSEND

Upon oral examination, taken by counsel for the Defendant, on the 6th day of February, 1979, at the offices of Associated Reporters, Inc., 2275 Main Street, Fort Myers, Florida, before Ozalena W. Miller, Notary Public, State of Florida at Large.

APPEARANCES:

ELLEN S. FRANCES, Assistant State Attorney, 20th Judicial Circuit, State of Florida, appeared for the Plaintiff.

WILBUR C. SMITH, III, Attorney at Law, of the Law Firm of Smith & Carta, Fort Myers, Florida, appeared for the Defendant.

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Thereupon,

MICHAEL TOWNSEND

was called as a witness by the Defendant, was duly sworn, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Would you state your name and occupation.

A Michael Townsend, deputy sheriff, Lee County Sheriff's Department.

Q Mr. Townsend, did you on or about December 14th, 1978, assist in the arrest of Virginia Martin and a Miss Brubeck?

A Yes, I did.

Q And that was at Martin's Lounge?

A Yes.

Q It's my understanding at that evening at approximately 9:30 you entered the lounge with a Lynn Kiser, who's an agent with the Lee County Sheriff's Department?

A Yes.

Q And when you entered the lounge did you take a table with Miss Kiser?

A Yes, I did.

Q And how far from the stage were you?

A Oh, thirty-five, forty feet from the stage.

Q What was – was any – strike that.

Were any performances taking place on the stage when you entered?

A Yes, there was.

Q What type of performance was this?

A Judy Brubeck was dancing on the stage.

Q She was the first dancer you saw?

A Yes, she was dancing when we walked in the door.

Q And what was she wearing?

A A black leotard type outfit similar to a one-piece bathing suit.

Q Okay. Was any music being played?

A Yes.

Q And could you determine where that was emanating from?

A From the juke box, you call it, beside the stage.

Q And do you know what type of music was being played?

A Rock music, disco type.

Q What type of dance was she performing when you came in?

A Disco type, rock dance, the kind the kids do nowadays.

Q Okay. During the performance did she remove any of her garments or – ?

A She unbuttoned the bottom of the leotard type outfit she had on when we first walked in and brought it up under her breasts, and all she had on at that point was a G-string.

Q What is a G-string, or what type of G-string was she wearing?

A Well, all it had was the black patch in front to cover up her genital area and the small strings that go around the side and nothing in the back.

Q When she pulled the leotard up was she facing the audience at that point?

A She was dancing with the whole outfit on. I turned around and said something to Lynn, and when I turned back around she was pulling it up, when I turned back around. She was in the process of pulling it up.

Q How long did she continue to dance with the leotard pulled up?

A Until the music ended. I'd say five, six, seven minutes. Through the duration of the song.

Q Okay. Until that song ended?

A Until that song ended, yes.

Q You don't know what song was playing, do you?

A Yeah, I do.

Q What was it?

Q I know the name of the group. It's Hot Chocolate. Now, I don't know what the name of the song is. It's a very popular song that's played on the radio now.

Q Is it a song that was popular by then a year and a half ago or a new one that was popular by then?

MS. FRANCES: I don't know which song you're talking about.

THE WITNESS: It's played on the radio all the time. It's a very popular song now.

BY MR. SMITH: (Cont.)

Q Okay. When that song ended, did she get off the stage?

A She got off the stage and went into the dressing room.

Q So let's assume just for argument's sake, it's four minutes long. The longest she could've danced was four minutes.

A Right.

Q If it was ten it could've been ten and if it was two it could've been two.

A Right.

Q While she was dancing with her leotard pulled up, did she ever turn so that her back was facing the audience?

A Yes. And at two or three times during the duration of the song she had her back toward the audience, and she

would bend over and put her hands on her knees and dance that way.

Q Shake her buttocks?

A Yes.

Q Could you see her entire buttocks at that time?

A Yes, you could.

Q When the song ended she got off the stage?

A (Nodding affirmatively.) Went into the dressing room.

Q Did you watch any other dancers perform after that?

A Two other dancers.

Q Did either of those dancers expose either their breasts, their genitals, or their buttocks?

A No.

Q Was it after those two dancers finished that you helped effect the arrest of Mrs. Martin and Miss Brubeck?

A Yes.

Q Had you been in Martin's Lounge before?

A No.

Q Had you ever seen Mrs. Martin before?

A No.

Q How did you know that that lady was the wife and co-owner of Martin's Lounge?

A Before we went in there she was described to me by Captain Yahl, intelligence, and also when we walked in Agent Kiser pointed out, "That's Mrs. Martin."

Q During the time that Judy Brubeck was dancing was your attention concentrated on Judy Brubeck or were you looking around the bar in general?

A While Miss Brubeck was dancing I watched her. Now, while the rest of them were dancing I also looked around the room.

Q Can you specifically recall seeing Mrs. Martin doing anything during the time that Judy Brubeck was dancing?

A She was sitting on a stool beside the cash register behind the bar, taking the money from the drinks that were being served.

Q Now, can you specifically recall her taking in money while Judy Brubeck was dancing?

A Yes.

Q How many times?

A Oh, two or three times. I don't remember exactly. They'd go up to the bar, she'd put it in the cash register.

Q Now, I understand you stayed there through two other dancers, and you probably saw Mrs. Martin performing this service during those other two dances, but can you specifically recall her doing it while Judy Brubeck was dancing?

A While Miss Brubeck was on stage dancing, now? Now, I know she did take money, as to which dancers was on the stage at the time she did this, I can't specifically state.

Q Have you ever been in a bar which featured stage dancing?

A Yes.

Q Has this been at time when you were not on duty?

A Yes, in other cities.

Q How many times, approximately?

A Two, three times, something like that.

Q You've gone to those places voluntarily?

A Yes.

Q Okay. Were you offended yourself, personally, by the dance that you saw on the stage?

A Personally I was not offended by this dance.

Q Okay. You were merely there to enforce the ordinance, which was your job that night?

A Right.

Q And in the past you have gone to bars which featured topless dancing or bottomless dancing?

A Yes.

Q And you have observed these type of performances before?

A Yes.

Q And did those other performances offend you?

A No.

Q Okay. Who effected the arrest of Miss Brubeck and Mrs. Martin?

A Agent Kiser arrested Miss Brubeck and I arrested Mrs. Martin.

Q You told Mrs. Martin she was under arrest?

A Yes, I did.

Q Did you advise her of her rights?

A Both Agent Kiser and myself advised her of her rights.

Q Did she make any statement whatsoever prior to being advised of her rights?

A Not that I can remember.

Q Did she ever make any statement to you that she was or in your presence to the effect that she was the manager?

A No. The only statement is that after I advised her she was under arrest, the only thing she said was, "I've been expecting it. Let me call my husband." And which I let her call her husband.

Q That was after you had advised her of her rights?

A Yes.

MR. SMITH: Okay. No further questions.

MS. FRANCES: I don't have anything.

MR. SMITH: Do you want to come back and read this, or would you like to waive reading and signing?

THE WITNESS: I'll waive it.

(Deposition concluded.)

STATE OF FLORIDA)

COUNTY OF LEE)

I, Ozalena W. Miller, CBR, RPR, Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing deposition of MICHAEL TOWNSEND was taken before me, in the cause, at the time and place, and in the presence of counsel, as stated in the caption hereto, at Page 1 hereof; that before giving his deposition said witness was duly sworn by me to testify the truth, the whole truth, and nothing but the truth; that the foregoing typewritten transcription, consisting of pages numbered 1 to 9, inclusive, is a true record of my stenographic notes of the testimony of said witness and of all proceedings had at the session at which said deposition was taken.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, this the 9th day of February,1979.

/s/ Ozalena W. Miller
Ozalena W. Miller, Notary Public,
State of Florida at Large.

My commission expires: 2/20/82

Next, Mr. Chairman this is Public Hearing considering an ordinance regarding the license of premises involving the prohibition of exposure of private parts or female breasts in an establishment which serves alcoholic beverages. First, I have reviewed the affidavit of publication and it does give the time and date of the public hearing and gives sufficient notes as per the statutory requirements. If it meets with your approval Mr. Chairman, I will make an introduction as to the ordinance and then as I understand your procedure, you will hear from the proponents first and the time limit (by the way can everyone hear me) you will hear from them and the time limit is 4 minutes and then you will hear from the opponents.

The purpose of this hearing is to consider whether this board should adopt a proposed ordinance prohibiting the exposure of private parts or female breasts in an establishment in which alocholic beverages are for sale for consumption on the premises. Each of you have a copy of the ordinance and the title of the ordinance, of course, if there before you, and unless you would like, I will not read the title. You requested this office to prepare an ordinance for your consideration which would consider the commercial exploitation of nudity in commercial establishments which may be adverse to the public's interest. I recognize that there has been considerable discussion as to your constitutional rights to prohibit such activity and of course our office has the responsibility of approving your ordinances for legal sufficiency. As to the adoption of an ordinance prohibiting topless dancing and nudity, the Supreme Court of the United States has held that topless dancing, like other forms of expression or communication, is protected by the First Amendment of the United States Constitution and that nudity per se is not obscene. If such activity or conduct becomes obscene, or lewd and lascivious, then such conduct would be in violation of the State

Criminal Statutes and therefore _____,
but because of the State's broad authority to control intoxicating liquors, pursuant to the 21st Amendment of the United States Constitution and the fact that the State of Florida has granted to the County the right to establish and enforce regulations for the sale of alcoholic beverages within the unincorporated area of the County, and I might add here our delegation of authority to Lee County and to other Counties is just to the unincorporated areas of the County. The State has also delegated this authority to each municipality, but because of that it is our opinion that the County has the authority to adopt an ordinance which includes prohibiting acts which may in themselves not be obscene or which may come within the First Amendment protection of freedom of expression. However, under your authority to control the distribution of liquor, you should believe that some such conduct which you are asked to regulate and which you are considering regulating has caused or may cause an increase in criminal activity. That such competitive, commercial exploitation of nudity is adverse to the public interest. That unlawful conduct, such as prostitution has occurred in and around such licensed premises and involved some of the performers and that the sale of liquor by the drink and naked dancing should not take place in bars and cocktail lounges. If you feel, after hearing the testimony presented to you this morning, that such conduct will or more importantly, has occurred, you may in our opinion, ban such nudity as part of your authority to regulate the distribution of liquor. We have based our opinion on two Supreme Court cases which we feel should be briefly discussed and if I can bear with you, because I know you have received a lot of input on this and I think that for your consideration this morning, we should briefly discuss these.

In the first case, the United States Supreme Court heard

an appeal in the case of *California v. LaRue,* whereafter hearing evidence at public hearings relating to the sexual explicit entertainment in toples and bottomless bars and nightclubs, weak evidence indicated that sexual conduct had taken place between customers and entertainers and that prostitution, rape, indecent exposure and assaults on police officers had taken place on or immediately adjacent to the licensed premises, they adopted a regulation prohibiting topless and bottomless dancing in establishments selling alcoholic beverages by the drink. At the hearing the board heard testimony that customers were found engaging in all copulation with women entertainers, prostitution occurred in and around such licensed premises and involved some of the female dancers. That assaults on police officers had taken place. The Supreme Court held that in view of the State's broad authority to control intoxicating liquors under the 21st Amendment, the challenge regulation did not, on their face, violate the Federal Constitution, notwithstanding the regulation prescribed some acts which were not obscene and which were within the limits of the first and fourteenth Amendment protection of freedoms of expression. Since the regulations were presented, and the context of licensing bars and nightclubs to sell liquor by the drink rather than the context of censoring a dramatic performance such as sitting in a theater and etc. In view of the evidence before the State Liquor Department, its conclusion that the sale of liquor by the drink and lewd or naked dancing or entertainment should not take place simultaneously in licensed establishments, was not an irrational conclusion according to the Court. They said that the Department's choice of a solution to the problem was not unreasonable and that the State's regulatory authority was not limited to dealing with the problems within the limits of Supreme Court decisions as to either obscenity or forms of communitive conduct. And in view of a _____

that the department's choice of the solution, their selection to ban topless dancing and nudity within the establishment rather than some other solution, the court said was not unreasonable and the State's regulatory authority was not limited to dealing with the problems within the limits of Supreme Court decisions that was already set forth, as to either obscenity or other forms of conduct. And in a very recent decision, decided on June 30, 1975, the Supreme Court of the United States upheld their decision in LaRue and stated in LaRue that we concluded that the broad powers of the State to regulate the sale of liquor, conferred by the 21st Amendment outweighed any First Amendment interest in nude dancing and that a State could therefore, ban such dancing as a part of its liquor license program. The Court went on to say that in the present case the challenged ordinance applied not only to places that served liquor, but to many other establishments as well. Therefore, in that case, because it applied to more than establishments which served alcohol, they knocked down that ordinance and they said that they knocked down the local ordinance which prohibited any female from appearing in any public place with uncovered breasts. The Court pointed out that there is no limit to the interpretation of "any public place". That it could include theaters, town hall, opera house as well as any public market, street or other place of assembly, indoors or outdoors.

I would like to basicly point out that this board does not necessarily have to find these extremes that I have set forth to you and which were set forth in LaRue. You may not necessarily have to find that these extremes have occurred. All this board need find in our opinion, is that these simultaneous acts, nudity and consumption of alcoholic beverage, are detrimental to the health, of all and welfare of the community and that there may be some direct relationship between the conduct and some criminal activity.

LADY: Do we have to show that there has been an increase in crime or a decrease in property value _____

HUMPHREY: What you have to believe or feel after the testimony is that there either has been or from the testimony there may be that there is some direct relationship between this conduct and that therefore it is detrimental to the health of all and the welfare of the public. That is basically what you should find. In fact, as I pointed out, that it has caused or may cause. Of course, you can look at other experiences and you will probably receive some testimony as to naked past conduct, but also opinions as to future conduct and as such committed in a Court, like you say, that it has caused or may cause an increase in criminal activity and that such competitive commercial exploitation of nudity is adverse to the public interests and that unlawful conduct has occurred or may occur around such licensed premises. So these are basically the things that you will be examining this morning, and of course, if you feel as I said after that, that you feel that these simultaneous acts or these acts which may occur and the fact that nudity or topless dancing in an establishment which serves alcoholic beverages are detrimental to the health to all and the welfare of the community, then in our opinion, you can adopt this ordinance. You can, of course, make some changes as to the change because of what I said earlier, I would like to be more explicit in the ordinance to say that commercial establishments located within the unincorporated area of Lee County. I think that you understand that like I say, we are getting our authority to the Federal Constitution which delegated to the State and then was delegated to Lee County and to the Counties only within the unincorporated areas to regulate liquor.

LADY: Are private clubs where memberships are paid and if people want their nudist colonies and everything, none of that is involved in this is it?

HUMPHREY: If that private club serves alcoholic beverages for consumption, yes ma'am.

Now it has got to sell alocholic beverages for consumption. If it is what we call a bottle club or where there is no sale of alcoholic beverages, then it is not even included in this ordinance and we feel that we cannot, basically as I said in the beginning, we feel that the Courts have been clear that nudity per se or topless dancing is protected by the First Amendment of the United States Constitution. However, you have the right to, of course, regulate the sale and consumption of alcoholic beverages and certain conduct which may result into that. So under that, if you feel that these connections have been met, and that this should be controlled, then we feel that you have the constitutional right to do so. Now, basically as to our ordinance, of course, it covers the first of prohibition against any individual operating the commercial establishment and then it sets forth in what we best could where it could be clearly understood the prohibited acts and then next it is unlawful for the female person and unlawful for any person on the premises of a commercial establishment to expose to public view his or her genital areas, buttocks, anus or anal or cleavage or to employ any device or coverage which is intended to give the appearance or simulate the genital area, buttocks, anus or anal cleft or cleavage. So I can cover each phase of the ordinance if you would like, or if you would rather wait and hear now from the proponents, we can do and then maybe discuss that at the end.

Next, anyone who would like to speak in favor of the ordinance, even though you may have some suggestions in regards to particular paragraphs of the ordinance, would you please (you have the cards would you call them).

Com. #1 I am going to ask Sheriff Wanicka to come forward.

Please refrain from the applause.

SHERIFF: First I would like to present to you the Petition, the letters and the phone calls I have received for and against. I have 1,915 for the ordinance and I have 1 against it. Look at it and I'm going to try and be brief and give you just a little idea why I asked for this ordinance to be brought to you.

First, I have been a citizen here for 23 years, I am a family man, I have two children and I don't want to see our County changed. Also, and everything I believe in, Christianity is against everything I believe in, but today I am here as Sheriff, not as a Father, not as a husband, but I have looked into it deeply about why do we want something like this. I think the most important thing in my job is to find ways to prevent crime and I have had some criticism that why should I get an ordinance together, is that my job or should I just be enforcing law. I think one of the most important parts of my job is to get an ordinance to you that I feel that we can slow down a crime or at least curtail it. We feel that definitely with these topless bars coming, maybe not every one of them, but some of them we know we are going to have problems. We are the fastest growing County in the nation and we started out with one bar and I think we ended up with around five that have come and gone. What would happen if we don't have an ordinance when we have many of them, well we have more problems and a good example is that we found out, like in New Orleans, they had a tremendous increase in prostitution in this area when they had topless bars and we found in Lee County that we do have prostitution, we know what it leads to in other areas. In the first six months of this year, we had 16 robberies and armed robberies that were related to prostitution. The prostitute set it up and — let me tell you where the problem is. We very seldom get to

court on this because most of the men involved that have been mugged or beaten up don't ever testify. They refuse to testify because of embarassment that they put themselves into. And of course a lot of people say they put themselves in that situation, they deserve it. Well maybe they do, but that's not going to help me when I've got a murder and robberies and people running loose, and these people that we find in this prostitution field do many other things, robberies, strong armed robberies and of course, they go into shoplifting and everything else. It is up to you, It is up to me to set an example for our community that we have a conservative, quiet community. I am not going to go any further because I could talk a long time, but I have asked Captain Wright, you asked me to get together some data that you felt would say whether we are going to have an increase or have there been problems and I have asked Captain Wright to look into it and I ask him to come forward now to tell you what the Complaints we have had in the two bars in question in Lee County, what we found in other areas and what have you.

CAPTAIN WRIGHT: In the first six months in 1975, the Lee County Sheriff's Dept. has answered 19 complaints in the Driftwood bar and 10 at Martin's. These Complaints were rather serious in nature and if you don't mind I'll read a few of them off. Driftwood, 1 auto theft, 1 larceny, 2 disturbances, 2 family disturbances, 1 woman cut and bleeding, 8 assaults, 4 disturbances where a gun was involved. At Martins we had a suspicious person, 1 larceny, 3 disturbances, 3 assaults, 2 disturbances where gun was involved.

In this same period of time, we are talking about the first six months of 1975, we have made 61 arrests on rape and sex related offense compared to 51 in the same period for 1974. Also, we have worked 19 cases of rape in 1975 compared to 6 in 1974, again a six month period. We have had problems getting information from other depart-

ments. I have tried to contact many of the departments, I contacted Washington, D.C. I think they came out with, or someone came out with the figure one time – 1/3 of their crimes are prostitution related. They don't even want to talk about it. I talked to at least 3 different departments, they kept shifting me from department to department, and they finally just came out and told me we don't have any information we can give you. I did get some information from New Orleans. They said that they have noticed a terrific upswing in prostitution in the topless bar area. It has become a hangout, the area the French Quarter, of course, for prostitutes. Prostitution in turn, according to our records and many others, is associated with more serious crime. Crimes of violence, crimes of assault and robbery. The Lee County Criminal Investigation Division has compiled a list of 13 cases since July 1 of this year that are prostitution related assaults and robberies, and if you don't mind my reading these, I was amazed myself. I had no idea how much we had. We don't put these statements together every day. I would like to read some of them. Subject attacked and robbed by six males while driving a car looking for a prostitute. Subject robbed after making arrangements with a prostitute at a bar. Subject attacked and robbed after picking up prostitutes. Subject attacked and robbed by prostitute and 4 accomplices after pick up. Subject robbed at gun point while with prostitute. Subject robbed at gun point while coming out of prostitute's apartment, his keys were taken and then they burglarized his business using his own keys. Subject robbed by two females after a pick up, had accomplice waiting. Subject attacked and robbed after being sent to an address by a prostitute. Subject robbed at gun point after picking up 3 prostitutes. While making arrangements with a prostitute, subject forced into a side street, attacked by female and two accomplices. Subject attacked and robbed after stopping to pick up prostitute.

Subject robbed and attacked by male after picking up prostitute and finally subject robbed by male after being with prostitute.

COMM: Let me ask you something, although you have _____ there that all of those related to prostitution, do any of those relate to any of the bars that we are discussing.

CAPTAIN WRIGHT: I don't believe they did. The criminal investigation got this information up.

COMM: In other words we are talking about prostitution, we are not talking about topless bars.

CAPTAIN WRIGHT: That's what we are saying, it is aiding it too.

SHERIFF: The biggest thing we have a problem on bringing statistics about the bars, is that they haven't been here long enough to really get too many statistics and maybe these bars wouldn't be a problem, but how about the next one and the one after. We know and the statistics show around the country, that some of these places are going to be worse than others. Some bars may never have problems, well I say never, you always have some problems, but some are worse than others.

MAN: You had how many complaints there that you read off.

CAPTAIN WRIGHT: I had 29 complaints.

MAN: How many more would you say went unreported. What would be your percentage.

CAPTAIN WRIGHT: A tremendous amount. Especially on prostitution. We find a lot of times, we find the goods taken on something and we go back and the guy has never reported it because of the embarassing situation. So we will never know how many we don't know about. We had to look at the future, not exactly what is happening now, but what will it cause is what we are looking at.

SHERIFF: I have to mention, that every time we talk about this, I always hear about how much great tax money

these bars bring in so lets not be too hard on them, they are a wonderful thing, to hear people tell it.

MAN: Except that we are not talking about bars in general, and I think you have to show the relation and correlation between the prostitution and the existence of topless bars, not bars in general, or crime related to prostitution that may have nothing at all to do with bars.

SHERIFF: Well we could wait six months to a year and wait until you get statistics and see how many people get robbed.

MAN: I think the burden is on somebody to show that.

SHERIFF: I think we showed it in New Orleans. Common sense wise, lets face it, people go into these bars and you've got a situation here where people do get overindulging and what happens then.

MAN: Now you understand if we go to Court with this ordinance what you are saying is you _____

SHERIFF: I think we are going to win it in court. I think we have got the basis for it and I think we have – we can show violence and we also can show in other areas, but we also can show in other areas what they are talking about. I think we can use these other things as bases and if we lose it we've tried. I think that is what is important is that we are trying to hold the community and that is the most important thing we can do.

MAN. . . . _____ are not employed by garages or by dry cleaning establishments or by public libraries. There is a particular place where they go. Obviously then there is a particular reason why they are there.

MAN 2: But in some places they aren't. Like Miami for example they have topless girls in shoeshine parlors _____ They also have topless girls in restaurants that don't serve alcoholic beverages.

SHERIFF: I think it is a start though, if we set precedents in Lee County for what we believe in. I think

we can establish a much can help a community keep its problems down. I think that's the whole answer here.

MAN 2: I understand all that, I'm just want to know how these figures have been used and how they relate to what we have to show in order to support the ordinance.

CAPTAIN WRIGHT: The relationship is that New Orleans has showed us tremendous increase in prostitution and I was showing that prostitution related crimes not the types of crimes.

MAN 2: We had prostitution related crimes here years and years before we ever had any topless bars here.

CAPTAIN WRIGHT: Sure, but you show an increase.

MAN 2: Oh, you've had an increase every year because of topless bars.

LADY: Can you tell me your statistics on the rape questions here now?

CAPTAIN WRIGHT: Rape Questions, the ones I gave you to begin with.

LADY: Well, you didn't list those out like you did the prostitution.

CAPTAIN WRIGHT: I don't have them listed. All I have is that we had 19 cases in the first 6 months of 1975 compared to 6 in 1974, the same period of time.

MAN 2: How many did you have the year before.

CAPTAIN WRIGHT: I don't know.

SHERIFF: Well, still, we didn't double or triple our population.

MAN 2: No, no, but you may have — the point is you might have had 13 the year before and 6 the next year and 19 this year.

LADY: I wonder how many rape cases.

MAN 2: You can use figures to show.

SHERIFF: The biggest problem is we are not going to be able to sit down and say that this rape was caused by

topless, well I think you realize it is almost impossible, but can we take that chance.

MAN 2: The point is, the statistics should relate to what we are discussing, not to * * * You could show an increase in traffic violations for the same period and say that

SHERIFF: We are trying to prevent crime really.

MAN 2: I know, but I'm saying that you could and then have to show that traffic violations have something to do with topless bars. You have got to show some relationship.

SHERIFF: I understand your point, but I think that well he's done shown that.

MAN 2: You mean the fact that there are 19 now and there were 6 last year but there might have been 21 the year before. He hasn't shown, I think we ought to find out.

_____ This is important.

_____ How important I think for us to show them is the fact that the morals of the community.

_____ Mrs. Bowen?

LADY: I would like to ask you, now this is a well known fact, that rape is one of the things that women have always hesitated to report due to the fact that the woman having been raped was one subject to the embarrassment and accusation. This I hope is changing now, but could you give me any statistics on percentages of rapes which might have happened that have not been reported based on rapes that you have found about it in prior times that they did not report.

LADY: Well, I mean rapes that they later found out did happen but were not actually reported and taken thru court.

SHERIFF: Betty, we just couldn't give you an accurate — it would be a guess and we know it happens, I think everyone knows that, we just — it would be impossible for us to tell you. I think we're getting more reported because of the way we operate, we're having female investigators

make it less embarrassing, but there always will be some because of the embarrassment – supposed embarassment. You know.

_____. The Reader's Digest had a long article not too many months ago and they estimated that 70-80% rape cases were never reported.

SHERIFF: That's a possibility.

LADY: That's right.

SHERIFF: It would be a sheer guess on my part at this moment.

LADY: I would be very hesitant I think if it should happen to me to report it due to the fact that when they get them in court they just rake the women up and down like they invited it to happen.

SHERIFF: Well, that's gonna change we hope with the new ordinances. That shouldn't happen again.

LADY: And, this is something I am hoping to see. We also have males who are raped and in particular, young males and uh its not just related to females and how many of these do we know about? The one remark that I said in the paper I imagine every man in Lee County was angry with me, but I did say this over Talk of the Town, I said, that anybody who was emotionally unstable, mentally disturbed, or with an excessive amount of alcohol, could, it could bring out the animal in a man, or it could bring out homosexuals or what have you, and this I hope all the men will forgive me now for saying it.

SHERIFF: I think you bring out a good point, because I think basically, what we see is that when people over indulge in alcohol and they get intoxicated they do things that they wouldn't normally do as an average citizen.

LADY: This is what I was trying to say.

SHERIFF: We run into we can't tell you how many assaults, murders, uh robberies and things that take place when people have to much to drink, and I think that's the

purpose of this ordinance in alcoholic establishments because who can say what will happen to a guy whose had to much to drink in there and we start with the _____ will it affect this individual? I don't know, but there is no doubt in my mind that somebody is gonna cause a problem because of it, without any doubt in my mind at all, because we have seen it in our town in the past and as we grow into a metropolis we'd like to set a precedent now before we get into the problems.

_____: Alcohol is like any other drug, once you get it into your system you don't know what its gonna do to you.

_____: Could you do this for me? Could you show me how much an increase or decrease there has been in crime related not only to those bars, but the other bars in Lee County as well, like ABC. Pick out several. Pick out four or five.

SHERIFF: That would take uh a tremendous amount of time.

_____: How long did this take?

_____: It took me about a week of three people working 8 hours a day cause we had to actually read the complaint itself.

_____: Yeah, well I'm actually trying to get at the fairness of this thing. If there's been 50 complaints

SHERIFF: All right, these two bars here we show.

_____: In one particular lounge this year during this period, 6 months, as compared to four or five last year in a bar that doesn't have topless entertainment, then I think its important if you're gonna show the figures that you says about complaints about these two particular bars.

SHERIFF: Let me ask you something Mr. Sayers, we showed you the type of crimes we have in these bars, many of 'em with guns.

SAYERS: Now wait a minute, you said these crimes were not related to the bars themselves.

SHERIFF: The complaints that we read off.

SAYERS: Oh, you say 19 on one and 10 on another. How many did you have before then.

_____: I have no idea.

_____: But let me ask you something.

_____: I was just trying to do a six month survey.

_____: Look at the type of crimes.

_____: Let's figure out some fair way to compare it.

_____: I understand that, but look at the type of crimes. As you willing to take the chance that we'll

_____: Then close 'em all down.

_____: Well, that's up to you.

SHERIFF: The main thing is we're trying to say that we don't want to take the chance of what's gonna happen after this.

_____: The point is that I think this is so far, I hate to get too involved in this right now, it's beginning to look discriminatory. (BOOS AND APPLAUSE) We shouldn't have applause or heckling or anything else if we're gonna carry this on and get it done today. But, the point is that it looks like discriminatory when you bring in figures on two bars, not on the other two, not on any others in the County.

SHERIFF: We only brought the ones in the County that we're relating to, cause the ones in the City, we don't have records on.

_____: Allright, but outside the City there are many other bars, why not show the figures on those in fairness and if you're gonna use statistics that's what a statistician. . .

SHERIFF: Then you would have to do . . . .

(BLANK IN TAPE)

_____: Well, Mr. Chairman

Chairman: Mr. _____, I think Mr. Sayers point is well taken in that if they're creating crime then we ought to close 'em all down and

(VOICES FROM AUDIENCE)

Chairman: Please

_____: _____ on this table sir it'll just go to WMYR, it won't go to you.

_____: I have one in my hand. I think the point that Mr. Sayers made is correct in that if we can show that they're creating problems then we ought to close 'em all down and yet, while we may say that, we are not the least bit willing to face it and I can tell you in that 2 1/2 years experience on this board, in fact, we have you know, members of this board that spend their time sometimes sitting in bars and then driving home, so uh, I'm very willing to know that we don't face that at all, but if you want statistics we can provide them. 50,000 people every year are killed in alcoholic related automobile accidents. Now you don't have to be intelligent to see where the problem is if you want statistics. Of that same related thing, hundreds of thousands are maimed, more hundreds of thousands go without food and clothing because of it and so on, so if you want statistics I can give 'em to ya all day, but the problem is that we've got our fingers in our ears and our bottle in our mouth.

_____: It would have took us, in fairness to your question Mr. Sayers, I understand what you're asking for and all, we could have spent months and maybe a year trying to get all this together but we wanted to show the types of crimes here. They haven't been in business long enough to set a precedent. Let's face it, they haven't been open that long. Do we have to wait a year to get a good balance?

_____: You come in here saying that there have been

19 complaints in one, 10 in another but you don't say how many there were before and you don't say how many. . . .

SHERIFF: I don't think that's important.

_____: You don't say how many there are in the other bars and lounges around here.

SHERIFF: I don't think that's important. We're not asking to close bars down. We can't close bars because we haven't got that power. I don't have it, but we're saying that the topless in 'em because we know it's gonna cause more problems, that's the only thing we're saying. We're not saying they have an increase, we're just showing the types of crimes and can you take that . . .

_____: No, but the list that he ran down of the type of crimes that led to prostitution had no relationship with these bars. What I'm saying is you're not sorting it out properly.

SHERIFF: I disagree with you.

_____: You're suppose to make a decision that shows there has been an increase in crime related to the bars and that we have to use that to prove the constitutionality of this thing, we're not doing it so far.

SHERIFF: We certainly are.

_____: This wouldn't hold up in court.

SHERIFF: Well, I think it will hold up in court. We looked at it in one way. We said we're having problems there, we went to another state and they had an increase in prostitution when they opened it up. People won't even talk about these agencies. We know what prostitution will bring about, this is what we're trying to bring to the board and give you a little background. Now if you want me to sit in there and watch everybody come and go its impossible. I know it's gonna cause a problem and I think anyone with common sense feels that way too. And, its up to you. I think we've presented our case the best we can for the time that these people have been open. There's no way that we can sit down. . . .

_____: Sir, we can't do everything we want to do, we can't enforce or adopt an ordinance if its unconstitutional.

SHERIFF: Well I think it is constitutional.

_____: Well, excuse me a minute, may I finish. We can't legislate against things that just because we feel that they're not right. I have a wife and a bunch of kids and I think maybe the County might be better off without topless entertainment, but that doesn't mean that I'm gonna sit here and pass a law saying we ought to get rid of it just because I feel that way. We have to have it substantiated and it has to be backed up in law. That's all.

SHERIFF: I have complete faith in Mr. Humphrey and his staff. They've done a fantastic job in drawing this up. I would've loved to had a county-wide ordinance against it anywhere, but they did a lot of research, they said this is the only route we can go, this is the only legal way and they feel that that's the right way to go and I have complete confidence and I think you should have too. They're the brains behind it, I'm not an attorney. They have to say which way and they've gone thru Supreme Court rulings and they say we can do it and I believe them.

_____: Well he's not all that sure yet till he hears the testimony as I understand it.

_____: . . . . I know that some people out in the audience may think that well, why are we asking these questions? If you remember my introductory remarks, and apparently most of ya are apparently in favor of the ordinance, there's got to be these questions, these factors have got to be shown or this ordinance is not going to be constitutional, so in fact, this is what we want to show that there's got to be some direct relationship between the conduct of nudity and topless dancing with the bar, not just the bar itself, but that's what you've got to regulate and so uh if you would just please bear with us in this respect, these questions have got to be asked and these are ques-

tions that we need ask in order to constitutionally regulate such activity.

_____: Mr. Chairman? In support of what Jim and Dick are both saying and I hope ya all are listening to it intently, is that uh really what we're talking about is your personal rights, no matter where they are, the principals are the same and that the law is still a law and I'm sure you know I feel about this particular issue, but that document hanging over there on the wall is a very precious document and that's what we're really talking about, protecting your individual rights in any field, and there's nobody in this room that believes in separation of church and state more than I do. And if you want to debate that, I'll just be glad to debate it with you.

_____: I think one thing we didn't bring up uh is what about those couple of polls that we showed about the increased . . .

_____: The Gallup Poll in 1969 shows that 3/4 of the American people are against or actually for stricter censorship of books, magazines and erotic displays and also in Warsaw, Wisconsin, they had a vote so to speak, that said that 79% of all people objected to nudity shown or described with emphasis on sex organs and if I might in this same thing here, we were trying to get to try to relate this thing it's the hardest thing in the world to do, there has not been to my knowledge, and I have tried everywhere I can think of, there has never been an actual survey nationwide to try to tie this thing together. This one book that I did get, report of Charles Keating, Commission on Obscenity and Pornography, has in it 60 cases of criminal activity which they directly relate to some type of obscene material. But as far as actually relating it to a topless bar, there has never been any type of a survey done that I can find. Now the only what that we can relate it is by going to other departments, we went to New Orleans, New Orleans

said yes, we definitely did have an increase in prostitution when we had topless bars. What I was trying to show was that prostitution in turn leads to other crimes.

_____: Well, really this is visual prosecution isn't it. This is a woman for everybody to look at and that's visual prosecution.

_____: The thing is that when you're talking about. . .

SHERIFF: I think that what we're trying to show here Dick is that on bringing up, I think Mr. Humphrey when he read this one Supreme Court ruling, showed that the violence, the problems that they had in these places, that's where we brought up the types of complaints we had with the use of guns, cuttings, the fights and all, they're not the type of places the average citizen maybe wants to go. I don't know.

_____: But none of them related to the bars. None of them related to either of those bars.

SHERIFF: I'm talking about the complaints we had 19 in town.

_____: They were at those bars, the 29 complaints. Oh you're not talking about the prostitution?

SHERIFF: No, I was talking about the 19 and the 10. These complaints are what we're trying to show set a precedent for violent crimes and this is what the Supreme Court

_____: How many did they have prior to opening?

SHERIFF: I don't know. What's the difference?

_____: The difference is the further we can back up this ordinance in court. . .

SHERIFF: I think we can back it up in court.

_____: The burden of truth is on us to show . . . .

SHERIFF: I tell ya what, tell 'em to _____ court, we'll have every record available.

_____: Well, we can't pass an ordinance hoping that somebody's gona get robbed or beaten possibly because

she didn't act. This is what we have to do. We have to act with a good conscience at times. I think we have the precedent set by the Supreme Court to rule on these things and its up to us to take action. You have to believe in your heart too Dick, I know, I feel it.

DICK: I feel certain ways too, but again I can't back it up with an ordinance.

SOMEONE: Any questions further?

_____: Thank you very much.

ALAN HARTLEY: My name is Alan Hartley. I represent the support of this ordinance and I am affirmly opposed to the existence and to the influence of topless bars in our community. I think most of us who live here came because of the absence of pollution and I speak not of just chemical, but a moral and spiritual pollution. I came from New Jersey. I'm a artist and a writer. My publisher is in New York and I have had the experience of seeing New York, which has been known as "Fun City" turn into Sodom and Gommora. It started out with just the kind of situation we have got here and now the theater industry has moved out, businesses are moving out because people are not safe in the streets and what Frank Wanicka is telling us about is happening. Now I think one of the great things about our community, one of the great things that crystalized the spirit and the force that we have here is what we celebrate every year with the Pageant of Light. This brings our community together in a tremendous constructive, positive way and we honor a man who had a great influence, he gave us light and we have men now who want to give us dark. They're not talking about a Pageant of Light, they're talking about a Pageant of Darkness. They want to turn out the lights and turn on the men. And we know this is not going to make good husbands, its not going to make good fathers and its not going to raise our

sons the way they should be raised. I don't think we should waste a great deal of time discussing something that is quite obvious. Mr. Sayers, you led us in a very moving invocation and you prayed to our father and you invoked the name of our Lord Jesus and if we need statistics we just have to open the word of God and see what God tells us. Sodom & Gommora. (APPLAUSE) We're going to have people come here this morning who will wrap themselves in the Stars and Stripes and talk about freeedoms, their freedom to do as they please. When I drove here this morning, I stopped at several red lights. I didn't get out and complain that my freedom was being infringed because I had to stop and wait. There are people outside these doors who'd like to be in this meeting this morning but they can't be here for obvious reasons. No one is complaining that freedom requires responsibility, and I think that freedom should not be confused with license particularly when license leads to licensiousness and the influence of topless bars in our community is a salacious influence and I recommend heartily that this commission would vote favorably and vote quickly to pass this ordinance and to stand firm. Our Lord makes it perfectly clear the people are going to come this morning too and say the body is beautiful, and it is, and say sex is lovely and it is, as God conceived it, but the Bible makes it perfectly clear that nakedness is a sign of immorality in the Garden of Eden nakedness represented sin and the first thing that God did was to give clothes to Adam and Eve when they recognized their exposure. And I think we ought to do the same thing. (APPLAUSE)

(END OF SIDE 1)

(BEGINNING OF SIDE 4)

_____: . . . above and uh if its large enough, 4 inches below and if it's not then it's got to be the length and we're discussing actually the size of the breast ya know. We all know that there are ladies endowed in different ways.

_____: I assume that what you're getting at is the nipple itself and the area around it.

_____: That's right.

_____: The only difference is between the 1 inch and the 4 inch because if there's a nipple and aereola, the aereola is probably the same radius above as it is below.

_____: Well, now some ordinances did do this. Some ordinances just said the nipple and aereola, as I pronounce it, the colored area if you want to put it in this plain language, but the aereola is what is prohibited. Now if uh you can do that and some ordinances did, we just said that we figured that this may be the more appropriate method, but there's no question that that defines it.

_____: The point is why not the same area above as below, that's the only thing I'm concerned about.

_____: I can answer that for you. Because for years we've been used to seeing more of the upper area and not the bottom area. That's where our tolerance has gotten longer, longer . . .

_____: Is that the reason? What is the reason for the difference. I don't understand what you do on the side of it, where you draw the line.

_____: Well, I guess the reason now we're talking about the support needed to hold ya know the support needed and more support is needed on the bottom that on top, I guess.

_____: Well, is that the end of the questions?

_____: But now let me really cover that part. (LAUGHTER)

_____: I'll admit I asked for that one. You know I was just afraid you're gonna ask me how we're gonna measure and things like that so um.

_____: No, no. You've got to _____ support and that's what I was really curious about. I don't understand it.

_____: No, this is a point that I'd like brought up. Do you want to define in that method or do you want to define it as to say that the nipple and aereola part of the breast will be covered.

_____: I think you're gonna have trouble with _____ inches myself.

(LAUGHTER)

_____: That may be the best approach if you say then there's no question of I think that the definition of aereola and the nipple part is sufficiently clear . . . should not be exposed.

_____: But now you can just bet you're right arm and I know that's illegal too but that if we do this then you're gonna have girls out there with bandaids on perfectly legal.

_____: Well . . .

_____: Yeah, it is basically covering the aereola part so. . .

_____: Well, this would mean that they just couldn't just . . .

_____: Wait a minute, we haven't even discussed the ordinance. He read the whole thing over to us before.

_____: No, no he didn't Jim.

_____: This is a public hearing to take testimony and discuss the ordinance before _____ cannot have time to discuss the ordinance and whether it properly constitutes . . . .

_____: Mr. Chairman? Can I ask a question?

_____: I thought I had the floor but I guess that you took . . .

_____: Well you can have the floor Mr. Chairman.

_____: I wanted to continue and ask another question. Jim, pay attention. Dick is here to . . . .

_____: How many _____ ordinances been passed?

_____: Mr. Chairman, Mr. Humphrey uh getting back to this ordinance. This would restrict topless performances in Lee County only in places that serve alcoholic beverages and uh restricts only topless entertainment in those places and says nothing about x-rated movies in theaters or pornographic books. This _____ will include all those forms of pornography I'd vote for it. In other words, if it will include x-rated movies (APPLAUSE) will include any movies which show pornography and any books that show pornography, I'll vote for it, if it also includes other kinds of businesses I'll vote for it. Right now there's nothing to prevent these same people from going over there and opening up a restaurant and having topless waitresses serving food or cokes or whatever. And there's nothing then to prevent anyone of any age from going in there. And, so I think it discriminates as it now stands and would be ineffectual because I don't think it would serve its purpose because I don't think there's anything to keep people from going out tomorrow and doing that same thing. Also it doesn't affect the three cities in the county. If you would include a clause in there to cover the showing of pornography in movie houses and uh books, well drive-in theaters and if you will include other businesses so that there can be no topless performers or waitresses or anything else in other kinds of businesses such as they've had in Miami, then I would do it.

_____: Jim, what's the difference if it's on sale or skin? Ya know.

_____: Well, cause . . .

_____: That's what we're trying to strike at. We're not striking at the place where it is, in Miami they went into shoeshine stands and just plain old restaurants.

_____: Mr. Sayers, I asked the attorney this when he was drawing it up and after it had been drawn up and he said you'd have to readvertise it.

_____: No, first of all, let me say this unequivocally from the research and audience uh here in the Supreme Court spoken clearly that topless dancing, nudity per se and in a public establishment such as a theatre, they just decided in Jacksonville the drive-in theater is a constitutional right of freedom of expression and we cannot regulate that. The only way you're regulating it is in the sense of the way that the conduct and relationship under your rights in the Twenty-First Amendment to regulate alcohol, just like you regulate that a uh an alcoholic establishment must be so many feet from a church, it must have so many seats in there, that's the way you're doing it.

_____: But the state threw out that requirement about distance from a church did it not?

_____: That's right, but see but on the same constitutional premise. Now to answer some . . . .

_____: In fact, one of the churches in No. Fort Myers built its church right next to this topless bar.

_____: Uh hum, right, but now let me to answer your question, the only thing that I can say on as to the other establishments is 1) from a practical approach and one is of course the state delegated to us, to the county, the right to regulate this in the unincorporated area, they delegated to the cities the same right, so it's up to the city fathers to consider such conduct and do they want to proceed with a similar type of ordinance. As to the relationship with alcoholic beverages, the only thing I can speak from there is a practical point of view that uh with the entertainment involved, the cost involved, they're general-

ly going to have to attach something like the serving of alcohol like beverages to make it pay for itself. No one's gonna go in and pay $1.50 for a Coca-Cola, $2.00 to get in to watch that and as a general rule.

_____: I've paid $3.00 and $5.00 to go to the movies without anything but popcorn. (LAUGHTER) And I say if we're gonna do it let's do it right and include everything . . . all the businesses and include . . . .

_____: That would throw out our chances of . . .

_____: The Supreme Court has already ruled upon public places . . . .

_____: Mr. Chairman? I called a motion.

_____: Mr. _____ (??)

_____: Ok, I'm concerned with correction too, but I want to point out one thing. It really bothers me to sit around this table and hear things said that are erroneous and even though they may be sincere in the intent and I may even agree with the sentiment, it just bothers me to sit here when errors are said. The Supreme Court did not say that it was illegal to pray in public schools Ms. Bowen. The Supreme Court said that it was illegal for the state to issue or to orient prayer in the city public schools and I'm for that 100, I don't want the Catholic Church writing prayers for my children to recite. Neither do you. That's what the law says. Now lets . . . not a thing, I don't want the Baptist Church writing prayers for my children either, I don't want to write mine for yours or yours for mine. You see my point? I'm just trying to make sure that we understand that what you say is incorrect. I want it right. I don't want . . . .

_____: Well maybe I didn't quote the law verbatim Mr. Goldcramp(?) but I know my children were not allowed to have prayer in school and my grandchildren were not allowed to have prayer in school.

_____: Well then you ought to go to court because they have a perfect right to.

Chairman: Mr. Humphrey?

Humphrey: Yes Sir?

Chairman: Our problem here today is strictly the topless and that's all.

Mr. Humphrey: Topless and nudity. Nudity also. If you, what we're basically for the review of the ordinance we're concerned with the topless dancing but also with nudity and uh by the way, I did have one point that you made. This may be a better way to define it on your question Mr. Sayers. It says in one of 'em that we're looking at where they said "exposes any portion of the female breast at or below the aereola thereof." So if that's . . .

_____: I would suggest that we strike the number of _____ parts.

_____: And then put that . . . ok.

_____: Use that definition.

_____: So, we'll work on that but it basically uh Mr. Chairman what it does is of course is prohibits the person from exposing his private parts from a female from exposing her breasts and also uh the exposing of, of course like I said, the private parts, the buttocks, the anus, the anal cleft, the cleavage.

_____: Now, that's all that we can work on right now. Am I right to get these others x-rated we're gonna have to bring up another ordinance?

_____: No, you'd have to amend the United States Constitution. (LAUGHTER AND APPLAUSE).

_____: We do have a big problem.

_____: That's not impossible either ya know.

_____: Can I ask a question P L E A S E?

_____: This can be amended later?

_____: Oh sure, but yet it always takes a public hearing, it takes . . . .

_____: The only thing is if the inches are eliminated would this mean that they could just take some around here and stick here and that would be it?

_____: Well, that's what they can do with the 1 inch, they can take a tape if they want to, 1 inch and so but what you're saying is you're covering up the aereola part and the nipple.

_____: There's some girls who . . . .

_____: You've got to draw the line somewhere that's all. The only thing is I think there's another problem we have and I think George mentioned it if I was paying attention right and that is I'm sure that they're gonna contest it and if they do and then its ruled unconstitutional, we're gonna have more serious problems and that's what I think the case ought to be as good as it can be when it goes there because if this is thrown out as unconstitutional then you're gonna have it spread all over Lee County and then go beyond topless entertainment that you have now.

_____: I have a . . . are you through Mr. Sayers;

_____: Well, the only thing that bothers me again is I say I would vote for it if you include all places of business in unincorporated areas of the county.

_____: I don't know.

_____: I have no objection to including all places in the County.

_____: Oh that's right.

_____: Because I just have to tell you that we don't have a fighting chance if you do that.

_____: I agree with you and so do they.

Chairman: I have a motion by Mr. Goldcramp and seconded by Mr. Wann. Are you ready for the question? All in favor? Opposed? So carried.

(END OF TAPE)

COUNTY COURT OF LEE COUNTY, FLORIDA
MISDEMEANOR DIVISION
COURT APPEARANCE RECORD

78CO5703A 06/04/79
CASE # DATE

BOND OF $ _____ CASH/SURETY
NO. _____

STATE OF FLORIDA VS.
JUDY ELIZABETH BRUBECK DEFENDANT

ATTORNEY ☐ PD ☐ OTHER _____

CHARGE

☐ PETIT LARCENY	☐ W/C $ _____ TO _____
☐ ASSAULT	☐ DISORDERLY INTOXICATION
☐ TRESPASS	☐ WELFARE FRAUD
☐ LOITERING/PROWLING	☐ BREACH OF THE PEACE
☐ BATTERY	☐ RESISTING W/O VIOLENCE
☐ GAMBLING	☐ POSSESSION OF A CONTROLLED SUBSTANCE
☐ CRIMINAL MISCHIEF	☐ INDECENT EXPOSURE
☐ _____	☐ PROSTITUTION

☒ VIOL. OF LEE CO. ORDINANCE

PLEA

☐ GUILTY ☒ NOLO CONTENDERE ☐ NOT GUILTY
TRIAL DATE: _____ AT _____ /M ☐ JURY

VERDICT • SENTENCE • COMMITMENT

☒ ADJUDGED GUILTY ☐ DISMISSED ☐ SENTENCE SUSPENDED
☐ FOUND NOT GUILTY ☐ WITHHELD ADJUDICATION
THE ABOVE DEFENDANT IS ORDERED TO:
☐ PROBATION FOR _____ DAYS / MONTHS
☐ $ _____ CASH / SURETY BOND ESTREATED
☐ OTHER _____

30 DAYS TO PAY FINE.

☐ Pay $ 43.05 FINE INCLUDING COSTS OR SERVE _____ DAYS IN THE LEE COUNTY JAIL FINE PAYMENT DEFERRED TO _____
☐ _____ DAYS MANDATORY CONFINEMENT IN THE LEE COUNTY JAIL
THE SHERIFF SHALL EXECUTE THIS SENTENCE AGAINST THE ABOVE NAMED DEFENDANT.

☐ NOLLE PROSSED

JUDGE, LEE COUNTY COURT

ASSISTANT STATE ATTORNEY

COUNTY COURT OF LEE COUNTY, FLORIDA
MISDEMEANOR DIVISION
COURT APPEARANCE RECORD

78 CO 57623 — CASE # — 06/04/79 — DATE

BOND OF $ _____ CASH/SURETY

STATE OF FLORIDA VS. — NO _____

VIRGINIA CHRISTINE MARTIN — DEFENDANT

ATTORNEY ☐ PD ☐ OTHER _____

CHARGE

- ☐ PETIT LARCENY
- ☐ ASSAULT
- ☐ TRESPASS
- ☐ LOITERING/PROWLING
- ☐ BATTERY
- ☐ GAMBLING
- ☐ CRIMINAL MISCHIEF
- ☐ _____
- ☐ W/C $ _____ TO _____
- ☐ DISORDERLY INTOXICATION
- ☐ WELFARE FRAUD
- ☐ BREACH OF THE PEACE
- ☐ RESISTING W/O VIOLENCE
- ☐ POSSESSION OF A CONTROLLED SUBSTANCE
- ☐ INDECENT EXPOSURE
- ☐ PROSTITUTION
- ☒ VIOL. OF LEE CO. ORDINANCE

PLEA

☐ GUILTY ☒ NOLO CONTENDERE ☐ NOT GUILTY

TRIAL DATE: _____ AT _____ /M ☐ JURY

VERDICT • SENTENCE • COMMITMENT

☒ ADJUDGED GUILTY ☐ DISMISSED ☐ SENTENCE SUSPENDED

☐ FOUND NOT GUILTY ☐ WITHHELD ADJUDICATION

THE ABOVE DEFENDANT IS ORDERED TO

☐ PROBATION FOR _____ DAYS / MONTHS

☐ $ _____ CASH / SURETY BOND FORFEITED

☐ OTHER _____

30 DAYS To PAY FINE

☐ Pay $211.05 FINE INCLUDING COSTS OR SERVE _____ DAYS IN THE LEE COUNTY JAIL FINE PAYMENT DEFERRED TO _____

☐ _____ DAYS MANDATORY CONFINEMENT IN THE LEE COUNTY JAIL

THE SHERIFF SHALL EXECUTE THIS SENTENCE AGAINST THE ABOVE NAMED DEFENDANT

☐ NOLLE PROSSED

JUDGE, LEE COUNTY COURT

ASSISTANT STATE ATTORNEY

IN THE COUNTY COURT IN AND FOR
LEE COUNTY, FLORIDA

THE STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	
- vs -	:	CASE NO. 78CO-5703A-B
	:	
JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN,	:	
	:	
Defendants.	:	
	:	

[Filed Jun 28 1979
Sal Geraci, Clerk County Court
By /s/ M. Everett D.C.

NOTICE OF APPEAL

NOTICE is hereby given that JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN, Defendants/Appellants, appeal to the Circuit Court of the Twentieth Judicial Circuit the Order of this Court entered May 30, 1979. The nature of the Order is a final order of guilt of the Defendants/Appellants for violation of Lee County Ordinance No. 75-9, Section 4-1(1), as a result of the Defendants/Appellants having entered pleas of nolo contendere and reserved the right to appeal the Court's denial of their Motions to Dismiss.

I HEREBY CERTIFY that a true and correct copy of the above Notice of Appeal has been furnished by Hand Delivery to The Honorable JOSEPH P. D'ALESSAN-

DRO, State Attorney 2200 Main Street, Fort Myers, Florida, this 28th day of June, 1979.

SMITH, JOHNSON, CARTA & MOCKLER
Attorneys for Defendants/Appellants
Post Office Box 2446
Fort Myers, Florida 33902

By: /s/ Wilbur C. Smith
WILBUR C. SMITH, III

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
APPELLATE ACTION

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN,	)	
Appellants,	)	
VS.	)	APPEAL NO. 79-2242 AP CASE NO. 78-5703 (78CO-5703 A-B)
THE STATE OF FLORIDA,	)	
Appellee,	)	

[Docketed & Filed Jan 7 1980
/s/ Clerk]

Off. Rec. 1399 F61112

Appeal from Lee County Court
Fort Myers, Florida
Honorable William J. Nelson

Wilbur C. Smith
P.O. Box 2446
Fort Myers, Florida 33902
Attorney for the Appellant

Mr. Joseph P. D'Alessandro
State Attorney
P.O. Drawer 399
Fort Myers, Florida 33902

PER CURIAM
AFFIRMED

/s/ James R. Adams
James R. Adams
For the Court

Honorable Ted Brousseau and Honorable Charles T. Carlton ..... CONCUR

ct. adm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Honorable Wm. J. Nelson, Trial Court Judge, Lee County Courthouse, Fort Myers, FL.: Wilbur C. Smith, Attorney, PO Box 2446, Fort Myers, FL; Mr. Joseph D'Alessandro, State Attorney, Fort Myers, FL; plus a certified copy to trial court file 78CO-5703A-B.

SAL GERACI, Clerk of the Court

By: /s/ Aaron L. Warnes
Deputy Clerk

I CERTIFY THIS DOCUMENT TO BE
A TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN MY OFFICE,
SAL GERACI, CLERK CIRCUIT COURT
LEE COUNTY, FLORIDA,
DATED: Feb. 1, 1980

By /s/
DEPUTY CLERK

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA APPELLATE ACTION

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN, Appellants,	)	
vs.	)	APPEAL NO. 79-2242 AP Case No. 78CO 5703 A-B
THE STATE OF FLORIDA, Appellee.	)	

ORDER

This cause coming on to be heard on the Motion for Rehearing and the Court having reviewed same and otherwise being fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that the Motion for Rehearing in the above styled cause is hereby denied.

DONE AND ORDERED for the Court this 25 day of January, 1980.

/s/ James R. Adams
James R. Adams
For the Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Honorable Wm J. Nelson, Trial Court Judge, Lee County Courthouse, Fort Myers, FL: Wilbur C. Smith, Attorney, PO Box 2446, Fort Myers, FL.; Mr. Joseph P. D'Alessandro, State Attorney, Fort Myers, FL; plus, a certified copy to trial court file 78CO-5703A-B. These were furnished to the above individuals on January 30, 1980.

SAL GERACI, Clerk of the Court

By: A. Warnes
as Deputy Clerk

FILED
Jan 30 1980
Sal Geraci
Clerk Circuit Court
By: /s/ _____ D.C.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN,	:	
Petitioners,	:	
vs.	:	CASE NO.
THE STATE OF FLORIDA,	:	
Respondent.	:	

PETITION FOR WRIT OF COMMON LAW CERTIORARI TO THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

Petitioners invoke this Petition for Writ of Common Law Certiorari to the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, and in support thereof state:

I. JURISDICTION

Petitioners invoke the certiorari jurisdiction of this Court pursuant to Article V, Section 4, Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2) to review the decision of the Circuit Court of the Twentieth Judicial Circuit rendered in its appellate capacity over a judgment of the County Court for Lee County, Florida.

II. FACTS

Accompanying this Petition is an appendix consisting of one separately bound volume. References to the appendix are designated by "A" followed by the appropriate page number.

(a) Petitioner, VIRGINIA CHRISTINE MARTIN, is the manager and wife of the owner of Martin's Lounge, a business licensed to sell beer and wine in Lee County, Florida. Petitioner, JUDY ELIZABETH BRUBECK, is an employee of Martin's Lounge, employed as a dancer for the purpose of entertaining the Lounge's customers.

(b) On December 21, 1978, immediately following the affirmance by the Florida Supreme Court of this Court's decision that Lee County Ordinance 75-9 was facially constitutional under the First Amendment to the United States Constitution [See, *Board of County Com'rs v. Dexterhouse,* 348 So.2d 916 (Fla. 2nd DCA 1977), aff'd in *Martin v. Board of County Com'rs of Lee Cty.,* 364 So.2d 449 (Fla. 1978)], Petitioner, BRUBECK, was arrested while dancing in the lounge and charged by information with violating Section 4-1(3) of the Ordinance, i.e., exposing her buttocks. Petitioner, MARTIN, was charged by information with violating Section 4-1(1) of the Ordinance, i.e., suffering or permitting a person to expose her buttocks while on the premises of the lounge (A 1-4).

(c) On February 7, 1978, Petitioners each filed Motions to Dismiss (A 5-8) the Informations based upon various constitutional grounds, including the contention that the Ordinance was unconstitutional as applied to Petitioners.

(d) Hearings were held on such Motions on April 2, 1979 and April 24, 1979 (A 15-28), whereat the tapes of the original evidentiary hearing concerning enactment of the

Ordinance as conducted by the Board of Commissioners of Lee County (A 58-82), Florida and the depositions of the arresting officers who testified to the alleged illegal conduct they observed were introduced as evidence (A 29-57). The tapes, material portions of which have been transcribed and made a part of the Appendix, (A 58-82) consisted of mostly citizens' views on the issue, and contained no evidence of illegal or immoral activities stemming from the dancing in Martin's Lounge (A 58-82). The depositions of the arresting officers revealed that Petitioner, BRUBECK, was clothed in a leotard, was dancing on a stage to music, unsnapped her leotard and raised it above her waist, which revealed only her buttocks since she was wearing a G-string under the leotard, that there was no physical contact between the dancer and patrons, and that as soon as the music ended the dancer left and stage and dressed (A 29-57).

(e) The County Court thereafter entered its Order on April 30, 1979, denying such Motions (A 9-14).

(f) On June 4, 1979, Petitioners entered pleas of nolo contendere reserving the right to appeal the denial of Motion to Dismiss and were adjudged guilty and fined $43.05 as to BRUBECK and $211.00 as to MARTIN (A 88-89).

(g) Notice of Appeal to the Circuit Court was timely filed on June 28, 1979 (A 90). In such appeal, Petitioners raised and argued the issues that the Ordinance was unconstitutional on its face and as applied to Petitioners under the free speech, due process, and equal protection clauses of the United States Constitution and the Florida Constitution (A 91).

(h) On January 7, 1980, the Circuit Court entered a per curiam affirmance of the convictions of Petitioners (A

138), rehearing denied on January 30, 1980 (A 139), from which affirmance Petitioners seek herein a Writ of Common Law Certiorari.

II. NATURE OF RELIEF SOUGHT

The nature of the relief sought by Petitioners is an order quashing the per curiam affirmance of the Circuit Court with directions to reverse Petitioners convictions upon the following grounds:

(a) The affirmance by the Circuit Court represents a departure from the essential requirements of law and constitutes error so fundamental in character as to fatally infect the decision and render it void. In this regard, by affirming the judgment of the County Court, the Circuit Court has ruled that the Ordinance is constitutional as applied to Petitioners' and constitutional under the First and Fourteenth Amendment to the United States Constitution.

III. ARGUMENT

1. As stated below, the Circuit Court, by affirming the judgment of the County Court, in effect ruled that the Ordinance was constitutionally applied to Petitioners, and that it was facially constitutional under the free speech, due process and equal protection clauses of the United States Constitution.

Petitioners have included as part of the Appendix to this Petition their Brief (A 91-137) to the Circuit Court in which the law applicable to these points is fully argued. In the interest of brevity, Petitioners respectfully refer the Court to such Brief for an in depth presentation of the Argument herein.

It is important, however to emphasize that this case is not a rehash of the *Dexterhouse,* case, *supra.* As the Court may remember, *Dexterhouse* arose in the context of a suit for declaratory judgment wherein the trial court held the Ordinance unconstitutional on its face without taking testimony or consideration of any evidence whatsoever. The County appealed such ruling and the only constitutional argument presented to this Court in *Dexterhouse* was whether or not the Ordinance was facially constitutional under the First Amendment.

The case at bar is wholly distinguishable from the *Dexterhouse* case for the following reasons:

(1) Petitioners have been arrested and convicted of violating the Ordinance, whereas *Dexterhouse* involved no actual loss of personal freedom, but only the threat of criminal prosecution.

(2) The County Court had the opportunity to review the tapes of the County Commission public hearing on the Ordinance in order to determine if the ordinance passed the "rational basis" test established by the United States Supreme Court in *California v. LaRue,* 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972), whereas the trial court and this court in *Dexterhouse* did not have the benefit of such tapes.

(3) The County Court had the details of the activities of Petitioner, BRUBECK, which led to Petitioners' arrest, as set forth in the depositions of the arresting officers (A 29-57). From such details, the County Court had an opportunity to determine the constitutionality of the Ordinance as applied to such facts, even if concurring that the Ordinance was facially constitutional, whereas in *Dexterhouse* the constitutional application of the Ordinance could not have been an issue.

(4) This Court was not presented in *Dexterhouse* the issue of whether the Ordinance is constitutional under Article I, Section 4, of the Florida Constitution (free speech), Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution (due process) and Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution (equal protection under the law). Thus, these issues were viable in the County Court and Circuit Court in this case and remain viable in spite of the *Dexterhouse* ruling.

With these material distinctions in mind, it is also important to note that the future judicial review of a possible unconstitutional application of laws banning public exposure of the human anatomy in bars was expressly reserved in the *LaRue* case, 409 U.S. at 119, and by this Court in *Dexterhouse,* 348 So.2d at 919. Likewise, the Florida Supreme Court in *Martin, supra,* interpreted this Court's opinion in *Dexterhouse* to apply only to the skeletal facts in the record of such case, thereby reserving the possibility for future consideration of the facial and applicational constitutionality of the Ordinance under a different, and presumptively, more complete record.

Petitioners respectfully suggest that the record in the case at bar is complete and should mandate further consideration of the fundamental constitutional issues existing in the case at bar, all as fully set forth in Petitioners' Brief to the Circuit Court (A 91-137).

Moreover, since the *Dexterhouse* and *Martin* opinions were handed down, two federal district courts (one being in the Southern District of Florida) have ruled ordinances identical or strikingly similar to the subject ordinance unconstitutional on their face as they apply to topless and

bottomless activities. See, *500 Via De Palmas Corp. v. McCutcheon,* ____ F. Supp. ____ (S.D. Fla. 1979), opinion attached at pages 148-200 of appendix; and *Looking Kool-Jolly Trolly, Inc. v. City of Toledo,* ____ F. Supp. ____, (N.D. Ohio 1979), a copy of the opinion being attached. See, pages 201-208 of Appendix. Such decisions fully support Petitioners' position that the Ordinance is unconstitutional both on its face and as applied to the facts of this case.

CONCLUSION

When the opinion of the Circuit Court is considered in light of the record in this case and decisions of the United States Supreme Court and recent lower federal court decisions, it becomes crystal clear that the Circuit Court totally ignored both the facts and law applicable thereto. Such decision, therefore, constitutes error so fundamental in character as to fatally infect the decisions and render it void.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by HAND DELIVERY to JOSEPH P. D'ALESSANDRO, State Attorney's Office, 2200 Main Street, Fort Myers, Florida on this 8th day of February, 1980.

SMITH, CARTA & RINGSMUTH
Attorneys for Petitioners
Post Office Box 2446
Fort Myers, Florida 33902
(813) 332-2686

By: /s/ Steven Carta
STEVEN CARTA

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT MARCH 5, 1980

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN,	)	
Petitioners,	)	
v.	)	CASE NO. 80-229
STATE OF FLORIDA,	)	
Respondent.	)	

Upon consideration of the petition for writ of certiorari filed in this court in the above-styled case, it is hereby

ORDERED that the attorney for respondent shall respond to said petition in writing filed with this court on or before March 25, 1980. The attorney for petitioner shall have ten (10) days from the date of service of the response to file a reply and supplemental appendix. Fla.R.App.P. 9.100(c)(i).

A TRUE COPY
TEST:

/s/ William A. Haddad
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: David Friedman, Esq.
Steven Carta, Esq.

March 10, 1980

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN,	)	
Petitioners,	)	
v.	)	CASE NO. 80-229
STATE OF FLORIDA,	)	
Respondent.	)	

Certiorari denied.

BOARDMAN, A.C.J., and SCHEB and CAMPBELL, JJ., CONCUR.

June 00 1980

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA IN AND
FOR THE SECOND DISTRICT

JUDY ELIZABETH BRUBECK and VIRGINIA CHRISTINE MARTIN, Appellants,	)	
vs.	)	CASE NO. 80-229
THE STATE OF FLORIDA, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Judy Elizabeth Brubeck and Virginia Christine Martin, Appellants, appeal to the Supreme Court of the United States the judgment of this Court rendered on June 4, 1980, denying certiorari review of the decision of the Circuit Court of the Twentieth Judicial Circuit affirming the ruling of the Lee County Court upholding Lee County, Florida Ordinance 75-9 as constitutional on its face and as applied in this case.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

SMITH, CARTA & RINGSMUTH
Attorneys for Appellants
Post Office Box 2446
Fort Myers, Florida 33902

By: /s/ Steven Carta
STEVEN CARTA

STATE OF FLORIDA)
) §
COUNTY OF LEE)

The undersigned, being first duly sworn upon his oath, does depose and say:

1. On this 5th day of July, 1980, one copy of this Notice of Appeal to the Supreme Court of the United States was hand delivered to Assistant State Attorney DAVID C. FRIEDMAN, 2200 Main Street, Fort Myers, Florida 33901.

2. All parties required to be served have been served.

FURTHER AFFIANT SAYETH NOT.

/s/ Steven Carta
STEVEN CARTA
Counel for Appellants
Member of Bar of United States
Supreme Court

Sworn to and subscribed
before me this 15th day
of July, 1980.

/s/ Eileen M. Williams
Notary Public

My Commmission Expires:
March 26, 1983

EXHIBIT X

ORDINANCE NO. 2550

An ordinance of the City of Boca Raton amending Chapter 4, Article I of the Code of Ordinances; creating Section 4-16 thereof, prohibiting the exposure of private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting the use of any device or covering which simulates private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting any person owning, maintaining or operating an establishment at which alcoholic beverages are offered for sale for consumption on the premises from suffering or permitting on the premises of said establishment, the exposure of private parts or female breasts or the use of any device or covering which simulates private parts or female breasts; providing for penalties; repealing Ordinance 2283, City Code Section 15-6.1, relating to the exposure of female breasts in commercial establishments; providing for severability; providing an effective date; providing for codification.

WHEREAS, the City Council of the City of Boca Raton, finds that there is presently in the City an increasing trend toward nude and semi-nude acts, exhibitions, and entertainment, and toward the utilization of nude and semi-nude female employees engaged in other service-oriented aspects of and by the commercial establishments subject hereto; and

WHEREAS, the City Council of Boca Raton finds that there is a relationship between the concurrent consumption of alcoholic beverages and the nude and semi-nude activities mentioned above prohibited hereunder, and

more fully described hereinafter and an increase in unlawful activities, moral degradation and disturbances of the peace and good order of the community, and further finds that the concurrency of these activities is hazardous to the health and safety of those persons in attendance, and harms the general welfare of the community as a whole; and

WHEREAS, the City Council of Boca Raton finds that the competitive commercial exploitation of such nudity is adverse to the public's interest in the quality of life, tone of commerce, and total community environment in the City; and

WHEREAS, The City Council of Boca Raton finds that in order to preserve the public peace and good order, and to safeguard the health, safety and welfare of the community and the citizens hereof, it is necessary and advisable to regulate and restrict the conduct of owners, operators, agents, employees and patrons of the commercial establishments subject hereto; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. That City of Boca Raton Code of Ordinances, Chapter 4, Article I, is hereby amended to include Section 4-16, which shall read as follows:

Section 4-16.

(a) It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the City of Boca Raton, at which alcoholic beverages are offered for sale for consumption on the premises.

(1) To suffer or permit any female person, while on the premises of said commercial establishment, to ex-

pose to the public view that area of the human breast at or below the areola thereof.

(2) To suffer or permit any female person, while on the premises of said commercial establishment to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Subsection (a)(1).

(3) To suffer or permit any person, while on the premises of said commercial establishment to expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(4) To sufer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

(b) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the City of Boca Raton, at which alocholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breasts as described herein.

(c) It shall be unlawful for any person, while on the premises of a commercial establishment located within the City of Boca Raton, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(d) Any person who shall violate any provision of this

ordinance shall be guilty of an offense against the City punishable as provided in Section I-8, hereof.

(e) If the owner, operator, lessor, lessee, manager, employee or any other person participating in the operation of a commercial establishment located within the City of Boca Raton at which alcoholic beverages are offered for sale or consumption on the premises shall be convicted of any of the offenses designated in subsections (a), (b), or (c) hereof then the City of Boca Raton shall have just cause to revoke the city occupational and alcoholic beverage license for said establishment. Revocation shall be by the City Council at a public hearing giving at least 15 days notice to the holder of the licenses proposed to be revoked.

(f) If at any time the license of an establishment is revoked pursuant to subsection (e) hereof at least 6 months shall elapse before another license may be issued to the same establishment and such license may be issued only after a public hearing on same held before City Council.

Section 2. It is declared to be the legislative intent that if any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of the ordinance shall not be affected.

Section 3. This ordinance shall take effect immediately upon adoption.

Section 4. Ordinance 2283, codified as Section 15-6.1 of the Code of Ordinances, is hereby repealed.

Section 5. Specific authority to codify this ordinance in the City Code of Ordinances is hereby granted.

CITY OF BOCA RATON,
FLORIDA

ATTEST:

/s/ Byrd F. Marshall

Byrd F. Marshall, Mayor

/s/ Louise C. Owens
Louise C. Owens, City Clerk

Approved as to form:

INTRODUCED BY Byron
ON 9/26/78
PUBLIC HEARING 11/14/78

ADOPTED 11/14/78

/s/ R.E.
ROBERT A. EISEN
ASSISTANT CITY
ATTORNEY

This is a true copy:

IN WITNESS THEREOF, I hereunto set my hand and affix the Seal of the City of Boca Raton, Florida, this 24th day of November A.D. 1978.

/s/ Louise C. Owens
City Clerk

IN THE UNITED STATES DISTRICT COURT,
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA.

Case No. 78-8391 — **Civ - JE**

500 VIA DE PALMAS CORP.,
a Florida corporation,

Plaintiff,

vs.

CHARLES A. McCUTCHEON,
individually and as Chief of Boca
Raton, Florida, Police Department
and, BYRD MARSHALL
individually and in his capacity as
Mayor of the City of Boca Raton,
Florida, and
MARK B. BYRON, III,
JOHN J. MEYER,
JEFFERSON H. MILNER,
AND CASSADY,
individual and as members of the
Boca Raton, Florida, City Council,

Defendants.

FILED

JAN 15 1979

Joseph I. Bogart
Clerk, U.S. Dist. Ct.
Southern Dist. of Fla.
Miami, Fla.

JUDGMENT AND PERMANENT INJUNCTION

THIS matter having come before the Court for Trial on the Merits, and the Court finding that it has jurisdiction to entertain the claims of the Plaintiff, and that the Plaintiff has standing to bring said claims, and the Court hearing testimony and argument from the parties, and further being fully advised in the premises;

NOW, THEREFORE, consistent with the findings and conclusions announced in open Court on December 20, 1978, the Court finds that certain portions of Boca Raton Municipal Ordinance No. 2550 are unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution. Those Sections found to be unconstitutional are as follows:

1. Section 1(a)(1);

2. Section 1(a)(2);

3. Section 1(b);

4. The Court further finds that the words "buttocks", "anal cleft" or "cleavage" contained in Sections 1(a)(3), 1(a)(4) and 1(c) are unconstitutional.

The above described Sections of said Ordinance which the Court deems to be unconstitutional, shall be severed from the Ordinance, and the rest of the Ordinance shall remain in full force and effect.

IT IS ORDERED that the Defendants, in their official capacity as Police Chief of the City of Boca Raton and members of the City Council of Boca Raton, and the City of Boca Raton in itself their agents, servants, employees or others acting under their direction and control be, and same are, permanently enjoined from enforcing those Sections of Boca Raton Municipal Ordinance No. 2550 that this Court finds unconstitutional.

DONE AND ORDERED this 15th day of Jan. 1979, in Miami, Florida.

/s/ Joe Eaton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 78-8391-Civ-JE

500 VIA DE PALMAS CORP.,
a Florida corporation,
Plaintiff,

vs.

CHARLES A. McCUTCHEON,
individually and as Chief of Boca
Raton, Florida, Police Department
and, BYRD MARSHALL, individually
and in his capacity as Mayor of the
City of Boca Raton, Florida, and
MARK B. BYRON, III,
JOHN J. MEYER,
JEFFERSON H. MILNER,
ANN CASSADY,
individually and as members of the
Boca Raton, Florida, City Council,
Defendants.

U.S. Courthouse
Miami, Florida
December 20, 1978

The above entitled matter came on for hearing before The Honorable JOE EATON, United States District Judge, pursuant to notice.

APPEARANCES:

The above entitled matter came on for hearing before the Honorable JOE EATON, United States District Judge, pursuant to notice.

APPEARANCES:

BRUCE L. RANDALL, Esq.
On behalf of the Plaintiff,

ROBERT EISEN, Esq.
On behalf of the Defendants.

THE COURT: I want to start by asking the City to assure me that it has made its entire record in this case, factually.

I'll announce ahead of time that the matter came on for preliminary hearing. Under the rule both parties were noticed that the trial, the final hearing was to take place approximately two weeks thereafter.

Testimony was presented.

I am now asking the City whether or not it has in fact presented all the factual background that it meant to present.

MR. EISEN: Your Honor, the only thing that I would say in response to that, I, at the last hearing, I asked the Court to take judicial notice of the type of dancing that is usually done in this, these types of establishments. The Court indicated that it might take judicial notice of that. If the Court will in fact not take judicial notice of the type of dancing performed, specifically in this type establishment or in topless bars in general, then I would like to put Mr. Tipping on the stand briefly, and have him describe the type of performance that occurs in this bar.

THE COURT: Well, now, if I had researched this case for two days based upon that I would be glad to receive it.

I told you at the last hearing that the Court didn't know what kind of dances went on in topless bars. I don't think it could possibly fit in the judicial notice rule. I am not at all certain that there is some kind of consistency in the type of topless dancing that is performed in barrooms for the purpose of the Court's taking judicial notice. I do note

there are a good many cases in the federal system that say that the usual type topless dancing is, in fact, within the First Amendment.

So, the answer to your question, you did not present it but you now wish to reopen to present something on it, is that right?

MR. EISEN: That is correct.

THE COURT: All right, sir, so that gets us into an entirely new factual consideration, to wit: constitutionality as applied. And I have already studied this case carefully. I have done it on the basis of evidence presented at the final hearing, the trial of the case, and I am not prepared now to start again to consider new evidence on the subject.

Now the evidence in this case as I understand it is that these people dance, period.

MR. EISEN: Well, Your Honor –

THE COURT: Is that it, right? They don't touch patrons, they don't touch and simulate fondling of themselves and things of that nature. They dance. Is that basically what the testimony was?

MR. EISEN: That is basically what the complaint said, although I think that categorizing the activity as dance is prejudicial. I think that what they are doing is they are performing and that performances as alleged in the complaint is that they tastefully remove their top.

And, whether you call that dance or not, I –

THE COURT: Is there evidence in this case, counselor, that these people are dancing? They don't walk around and remove their top and walk off? Talking to counsel for the plaintiff.

MR. RANDALL: Yes, Your Honor, I believe the evidence showed, I believe, that they are dancing. Also showed there is no touching that takes place between any of the customers and any of the dancers or between any of the dancers themselves.

THE COURT: All right. Now just as a matter of in-

terest, do you have some startling evidence you want to produce that would be contrary to the plaintiff's evidence?

MR. EISEN: No, Your Honor.

THE COURT: All right. Now, question number two is this and it is directed to the plaintiff's lawyer. You have some mention in your complaint of an equal protection argument. As I read it you argue only that you were the only bar in town that had topless dancing and they passed this ordinance just to apply to you and therefore it is a denial of equal protection. Have I misinterpreted your position?

MR. RANDALL: Judge, the equal, that is partially the equal protection argument. Essentially, there was evidence that showed that there was, there is only one bar offering this type of entertainment, and therefore the ordinance would be directed just at that particular bar.

We also raised a discrimination type of argument which may be considered equal protection in that –

THE COURT: Well, you did have that language in your complaint, thereby discriminating against the Plaintiff.

MR. RANDALL: Well, I'm talking specifically about discrimination on the basis of sex, against females.

THE COURT: So you are talking about men versus women as to baring of breasts.

MR. RANDALL: Yes, sir.

THE COURT: But you have no argument as, about discrimination as against equal protection of the law if the city in its police power attempts to regulate this type of dancing only in barrooms? That is not your argument, correct?

MR. RANDALL: Well, we also raised that there was no rational reason for limiting the regulations strictly to places which sell alcoholic beverages on the premises, okay, why, there is no rational reason you know, for that distinction and there is no, an equal protection argument there if you have a similar establishment that doesn't sell

alcoholic beverages then they are allowed to dance any way they want.

THE COURT: So you do have an equal protection position. I think it is in your complaint and I believe you made some mention of that in your papers or argument, did you? –

MR. RANDALL: Yes, sir.

THE COURT: Do you understand that was one of his positions, counsel?

MR. EISEN: Yes, and I responded in memorandum and I can respond now, if you like me to.

THE COURT: All right. Thirdly, I wish to ask the counsel for the City a very important question, whether you can point to any case in the federal appellate system where any topless dancing ordinance or regulation has been found constitutional, either on its face, or as applied.

MR. EISEN: Well, I would point to, I believe, the case I gave your Honor last time, Hodges v. Fidel I believe is the style, I have to look up the cite, but that was what, a district court case.

THE COURT: My question is, I know you have one in Nebraska and I have a later case in Nebraska exactly contra on the district court, perhaps the place from which you found your cite, but in any event my question is can the City point to any case in the federal appellate system from whence districts courts get their directions, not from other Nebraska district courts, which incidentally there are 20 out there in Nebraska, that rule otherwise, any case at all in the federal appellate courts that uphold a topless ordinance or regulation, topless dancing prohibition, either facially or as applied. Do you have the first federal appellate court case in your favor?

MR. EISEN: I did not find one.

THE COURT: Okay. There isn't one, is there?

MR. EISEN: But I would state that I think the Salem Inn line of cases are supportive of the City's position in

this instance although they have of course, ruled those ordinances unconstitutional.

THE COURT: How in the world does any Salem Inn case support you?

MR. EISEN: Your Honor, by implication, they considered an ordinance, they found it too broad. They said that it didn't come under the LaRue holding and I believe that the City of Boca Raton does come under the LaRue holding.

THE COURT: Okay. That is my next question.

How in the world does the City take the position that it is exercising Twenty-first Amendment rights?

MR. EISEN: Your Honor, as I stated in the argument before, I don't think that the Twenty-first Amendment question is the key to LaRue. I believe the key to LaRue is the fact that the conduct sought regulated is symbolic speech, that it partakes of minimum First Amendment protections. You have a balancing with state regulations, and in LaRue they balanced the speech aspects there with the intent of the state regulations, and found in favor of the state. I think the Twenty-first Amendment issue was a factor in weighing the two rights but not the determinative factor and it seems to me that when the City is legislating and in this case permissively within the sphere of alcoholic beverage –

THE COURT: Within their police power.

MR. EISEN: Within their police power, within the regulating conduct which is the sphere of alcoholic beverage control, within their police powers, it seems to me to make little difference whether it comes directly from the state as a delegation of alcoholic beverage control or whether in fact it is within the sphere. I think the important point is that in regulating the activity which the United States Supreme Court has found takes on a greater degree of –

THE COURT: My question is, does the City take the

position that it is in fact enacting ordinances under, within the authority of the Twenty-first Amendment of the Constitution of the United States.

MR. EISEN: I believe we are for this reason.

The Twenty-first Amendment delegates alcoholic control to the states. If they look at the state constitution the Florida Constitution, there is no specific provision delegating or limiting that solely to the state.

Now the legislature has taken upon itself to enact comprehensive regulations of alcoholic beverages and in that act they have delegated specific areas of authority to municipalities.

This area of regulation is not within one of those areas.

Also, as a matter of general law, as common law in any area which the state does not regulate the city is free to regulate.

The state—

THE COURT: Well, certainly it is free to legislate and that is what you fellows have done to the Court and confused the issue.

Sure, it is free to regulate. The question isn't, is the exercise of the police power somehow or other contrary to the beverage control law.

It isn't — Just a moment.

The question is whether the City is enacting liquor control regulations within its municipal power to do so.

Their argument that — oh, heck, this isn't contrary to anything in Florida law, therefore the authority has not been usurped by the state liquor control board or Beverage Commissioner — is one set of, one ball of wax.

Certainly it isn't.

That is where you have the police power authority to do it.

But the question of whether or not a city is operating under the grant, the constitutional grant of the Twenty-first Amendment is an entirely different proposition or

whether you are properly within your police power. So just tell me this, just very simple, does the city enact that ordinance under the authority delegated to the state by the Twenty-first Amendment?

MR. EISEN: Through the constitutional home rule powers they do, I believe.

THE COURT: Constitutional home rule powers?

MR. EISEN: That is correct. The constitution delegates to municipalities the authority to regulate in any areas not preempted by either the constitution or state law. We are regulating in an area not preempted by the constitution or state law.

We happen to be dealing in the liquor regulation realm so it seems to me that we are taking that power from the state by lack of preemption and from the constitution. And finally it would seem to me to make little difference whether there was specific grant of authority or not.

The fact is that we are regulating in the area of what, the liquor control, and we are dealing with the same type of factual situation and the same evils and it would seem immaterial whether –

THE COURT: Let me tell you what the materiality is, the Constitution of the United States. That is the only materiality of it because absent the Twenty-first Amendment, there could have been no regulation.

Therefore, the Twenty-first Amendment said the states may do it.

Justice Rehnquist says, make reference to it in a case which I'll tell you about in a little while. The state may also delegate its liquor control authorities to municipalities if it does it precisely as it has done in many states which gives rise to a lot of confusion about city ordinances under the Twenty-first Amendment which my friend may or may not have noticed over there.

But the difference is that you can delegate from, by the United States Constitution to states. The United States

Constitution didn't delegate it to cities. Then the question is has the state delegated its Twenty-first Amendment control to the city.

That is the three areas with which we are all familiar precisely.

So, the first problem that developed in this case was that they got confused about LaRue which isn't applicable at all in this case and I will point out why in a few minutes, not because it has to do with certain revelries, but because it is a Twenty-first Amendment case, where this one and where the Salem Inn cases were not.

That point was made very clearly by the trial judge the fourth time the City of Hempstead or whatever it was set about to try to ban topless dancing. He said for the first time we now have a new picture, because what happened was the city tried three times under its police power and lost every time.

So finally on its fourth try it got the state beverage department into it. So the state beverage department went down and brought proceedings thereby bringing into play the Twenty-first Amendment.

That is why the trial judge said this is an entirely new matter, entirely different from all of the other cases. So that is the first place that somebody got off on the wrong track on this case, but I think you have answered my questions.

Now, here we will start. Number one, this case does not just have to do with bosoms and anal clefts.

So that the people who are here interested to pass along this information to the public which they figure apparently is considerably interested in those matters, this proceeding is not designed to discuss bosoms and anal clefts.

This case involves the Constitution of the United States, and this Court is called upon to discuss the Constitution of the United States.

It happens that the First Amendment expression involv-

ed in this case is topless dancing, and perhaps anal clefts. But this case is about the Constitution, not bosoms.

Secondly, we are not going to be able to meet any deadlines for anybody because I have worked hard on this case and not only am I going to announce the ruling in depth, I am going to do it so as to preserve this research. And I have had at least fifty people call and say when is the Judge going to rule and then we want to know how he ruled.

The answer, the way I ruled is it is going to be ruled on today.

It is going to take a couple of hours and I hope you fellows get a good fee out of it to sit here and listen and if I could tell somebody who called in from the press what the ruling was in two minutes, I would give them a pretty sorry ruling.

I tell these folks when they call that I don't write newspapers and I don't try to reduce constitutional rulings down to a three paragraph announcements and that if he wants to know what the ruling is he has to come down and listen for a couple of hours and that I can't call them up and repeat it because in the first place I don't have it written out.

It is being given extemporaneously so you folks that are here are going to endure a rather serious discussion of constitutional law and when we are finished if you can reduce that down to generalities, particularly to something that is appropriate and appealing to the reader, that is your job, but mine is to get the job done.

Everybody understands where we stand.

So this is going to be painful for you. You might prefer to leave and have one of these fellows tell you what the ruling was.

But I am not writing for the press, and I am not writing for anything other than the treatment of the constitutional problems involved.

Number one, this case is not a LaRue type case.

This case is not a Twenty-first Amendment consideration type case.

And that is so because the Twenty-first Amendment vests the states with authority under it and it confers something more than the normal state authority over public health, welfare and morals.

As a matter of fact, the cases say that in the Twenty-first Amendment type situations such as LaRue, the LaRue case, there is a rather relaxed standard of constitutionality as distinguished from strict scrutiny standards where the First Amendment and the police power of the city is involved.

We shall discuss that more in a moment.

Now in the first place, the answer to whether or not this is a Twenty-first Amendment case comes from the Supreme Court of Florida, where it is supposed to come from because in the cases where ordinances similar to this one have been upheld on their face, and I underline on their face, those cases in Florida have to do with the valid exercise of police power of either a county or a city.

In Martin versus the Board of County Commissioners of Lee County, the Supreme Court of Florida said that this ordinance was within the county's police power.

It told us specifically that the statutory scheme of state regulations in the area of liquor control does not embrace the area of conduct covered by the Lee County ordinance. It tells us that the Division of Beverage Control is granted full power to adopt regulations to carry out the beverage laws of this state, and the case tells us that the Court recognizes the limited areas within which local government can legislate.

They say that the local control over establishments selling alochol is limited to the hours of operation, the location of the business, and sanitation.

However, in the case that we are referring to, the Lee County matter, the Court said that there is a difference betwen enactments which govern the conduct of individuals as opposed the regulation of the licenses themselves and the sale and dispensing of alcoholic beverages and that the city or the county does in fact have a right within their police powers to regulate conduct of individuals.

The Florida courts have taken the position in the cases that counsel relies on, as have most of the state courts around the country, that topless dancing is not First Amendment protected.

That it is simply not speech, even though it expresses ideas and opinions.

But in any event we know from the Florida statutory scheme, which is there to read and simple to read, that no authority has been delegated by the state to the municipalities other than that to which we have just referred. The City simply does not have Twenty-first Amendment rights. It has police power rights.

Now, to demonstrate the importance of that, we look to Justice Rehnquist who somehow has become the authority in the country on Twenty-first Amendment liquor control facial validilty, and who has been given the responsibility of attending to cases of that nature, apparently. In the Doran v. Salem Inn case 95 S. CT. 2561, which was a '75 case, the Supreme Court of the United States was considering a preliminary injunction that had been granted by the trial judge. This was about the second attempt. This was not the first attempt of the city but the preliminary injunction was upheld in the Court of Appeals and the Supreme Court of the United States entertained it.

And what the Supreme Court was talking about was the possibility of the likelihood of the plaintiff prevailing in the case below. The Supreme Court determined that the District Court didn't abuse its discretion in granting preliminary injunction.

And here is what it said.

We are still talking about delegation of authority from states to cities.

The Court, looking back now to the situation in the trial court and considering the question of whether or not there was a likelihood of success on the part of the plaintiff said this.

"Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead," meaning that is point number one we would have to consider.

Now, we don't know that from the record, but even if we assume that the state has so delegated its power and that the ordinance would therefore be constitutionally valid under LaRue because of the Twenty-first Amendment, we would, even to get to that, we would have to assume that the state had so delegated it. This would be their, the defense of the plaintiff's case below, because the Court, you remember, is considering whether or not there is a likelihood of, probability of success. So this they said, listen, they haven't reached that point, but even if they have, we had, and even if it could be held constitutionally valid under LaRue, the Twenty-first Amendment case, says this petitioner, does not raise any legitimate state interests that would counter-balance the constitutional protection presumptively afforded to activities which are plainly within the reach of the local law.

Presumptively constitutional protection.

That case was topless dancing.

So the Supreme Court said, look, the first thing we would have to consider before we even thought about the law is whether or not the state had delegated its power to North Hempstead. If it had, and even if LaRue is applicable, a liquor control case, under those circumstances, then the city has not raised anything that would counter-

balance its constitutionally protected presumption under the First Amendment.

Meaning that as applied, the plaintiff may prevail in this case because LaRue, as we understand and specially from that announcement, and it is often cited, left arms.

Then the city reduced the scope a little bit. . .

But you recall they still put in the restaurants and theaters and cabarets, all sorts of things, trying to adjust to the first ruling.

They tried three times before they finally figured, listen, the city can't do it, but perhaps the state can under the Twenty-first Amendment.

And that is when Judge Bartels said this is an entirely different situation and he declined to enter the preliminary injunction the fourth time on a facial challenge.

We must also recognize the great distinction between facially constitutional and constitutional as applied as we read these cases including LaRue, which is not applicable to our situation.

So we wrote in our brief, one of us did, one of you did and I commented upon it quite improperly, that these fellows didn't get the message who were trying to draft those ordinances about preventing them.

Well, the more I have studied this case the more I realize that the city attorney who was employed to try to stop topless dancing, for which he was never successful, really did know what he was doing.

And that brings into play equal protection.

And that brings into play the distinction between state Twenty-first Amendment power and city police power.

Because what the city attorney was obviously trying to do was to avoid an equal protection argument in a police power enactment.

Because he knew he wasn't under the Twenty-first Amendment, and he knew that if he just passed an or-

dinance that applied to topless dancing in a bar, that he was going to run directly into the face of the equal protection proposition under the police power.

Because he did not have the Twenty-first Amendment to travel on as the City of North Hempstead because that authority had not been delegated to him by the state, so the city continually attempted to bring the thing within their police power and to avoid the equal protection argument.

So you say, well, that doesn't make sense. It does if you think about it this far because what the federal courts were saying was First Amendment. They were talking about theaters, and artistic presentations and that this thing was too broad within the First Amendment.

Finally when they tried in the City of North Hempstead to reduce the thing down to get past a theatrical production somehwere in the downtown woman's club, there they got over in the equal protection area and this court said you can't do that. The city can't single out a bar and say you can't dance topless there.

Why not other business establisments?

So the people in North Hempstead were doing what they could do within their police power trying to avoid an equal protection argument, knowing they didn't have the Twenty-first Amendment power.

Finally, when they lost, as every one has done to my knowledge that has ever tried to pass a topless dancing ordinance, they have lost absent Twenty-first Amendment, either facially or as applied.

I will tell you something interesting about California when we get to it, and the background of the LaRue case.

In any event, at this point, as rambling as it may be we are trying to show that this is a Salem Inn situation not a LaRue situation, not a Twenty-first Amendment situation at all.

Now, what happened in Salem Inn we all know, and I won't repeat it much more than I have done, much more than I have discussed it already, but we do recognize that this is the police power case.

The only way that LaRue ever becomes confused in a police power case is the courts that are writing in a police power city ordinance case, non-Twenty-first Amendment type case, cite LaRue for the proposition that not every form of entertainment that might be covered by their ordinance is unprotected by the First Amendment. Do you remember that general language?

This is not to say that some of these things that are prohibited may not be protected by the First Amendment. Then they go to talking about modicum of protection, so that that language sneaks into the police power cases to show that First Amendment might be involved, or is involved, depending upon the ruling.

But the Salem Inn cases are the police power cases and that is what we have here.

The final effort was in the broad, very broad statutes, started back in '73. And there the judge first noted what I am telling you all today. That is in the first written opinion by Judge Bartels who managed this proceeding for years. 364 Fed Sup 478.

The judge wrote this, obviously likewise predicated upon the powers of the state liquor authority, has no relevance to the constitutionality of the present ordinance which has no other justification than the exercise of the police powers of the community.

So it didn't come as a surprise to the trial judge on the fourth attempt that they turned to challenge the state regulation, that is that the city brought into play the state power in order to attempt to affect its results.

So there at the outset of Salem Inn versus Frank, the judge says, listen, this is not a LaRue type case, it is a city

ordinance under the police power which is what this city in the case before this Court has.

There from the beginning, turning to the merits of it, the judge says it is clear that dancing is a form of expression protected by the First Amendment.

That granting of the preliminary injunction went up to the Second Circuit, and that Circuit held that dancing is a form of expression protected by the First Amendment. Even nude dancing, which this isn't in this case before us, can be within the constitutional protection of the First Amendment.

The Court of Appeals, in that first appellate decision in the Salem, Frank and the Salem Inn cases, said that clearly that ordinance as written here would encompass protected expression within its prohibitions. And that protected expression was topless dancing.

Then they made a point which so few people recognize, really. I didn't really think about it until I got to studying this.

"That while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content as viewed by judges or in quality as viewed by critics, it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye."

Now, you know that sounds like at first reading just some interesting language that some individual named Oakes wanted to put in an opinion. But it is far more than that.

And here is what it says.

It says that under the police power, as distinguished from Twenty-first Amendment rights to be exercised by the State of Florida, that expression runs between the dancer and the observer.

The First Amendment right that the Court is talking about is not just the right of the dancer to dance, or the owner of the premises to cause the dance for commercial purposes, which we understand is covered by all the cases. There is no bar to his exercising his First Amendment rights.

But further, and most important and often overlooked, the First Amendment rights have to do with the freedom of communication, freedom of expression as well as the freedom of reception.

So that the city, under its police power, has by majority vote not simply unconstitutionally infringed upon the dancer's right of expression, but rather upon the observer's First Amendment rights as a receptor of expression.

And that is what this nice language means that we read and enjoy sometimes, some of us, I guess, that it may not differ from the dance viewed by the person who, having worked overtime for the necessities of life, wants some entertainment with his beer.

Now, what they are really talking about there is equal protection and First Amendment.

The cases that somehow say "Hair" is all right because it is First Amendment, turns on First Amendment, freedom of expression, because viewers want to see it, and it is an expression and it is communication between viewer and the performers of Hair.

But what the case is saying is that same situation under the First Amendment exists whether it is in a barroom or a theater because the folks that can afford it might prefer to go to see "Hair," but the fellow who drinks a beer after work might get his expression in a barroom.

So that First Amendment does not just run to the dancer or to the individual who is operating the commercial establishments.

Now, comes the message in this case that has absolutely

nothing to do with the law, but I sometimes find that even in talking about bosoms and anal clefts, that the law is tremendously interesting when you have the time to study it, and here is a little background that you might appreciate.

The court of appeals judge who wrote Salem Inn versus Frank, the one that we are now discussing about the fellow down in the barroom, speaking of First Amendment and equal protection, is a Vermonter. He is the attorney general, or was the attorney general of the state of Vermont and wrote this on the Court of Appeals for the Second Circuit. And here is the key to this case.

One must be careful in making judgments in this area, speaking of First and equal protection, First and Fourteenth Amendment as to expression.

"One must be careful in making judgments in this area to avoid permitting judgments of taste to become rules of law."

I think that is a right profound statement coming from him.

Although it has no bearing on the law, people like to look into a judge's individual background for whatever it is. I mention former attorney general of all the states of all, the State of Vermont.

So, later I shall show you the cases where the Twenty-first Amendment comes into play and tell you why that even if the Twenty-first Amendment were applicable here, even if the court is wrong which it isn't, but in the interest of covering the whole subject I am going to tell you why even if the Twenty-first Amendment was applicable here, this ordinance is both facially and constitutionally unconstitutional as applied as has to do with one section and one section only which I shall come to in a moment.

I guess by now that you folks have discerned that this is an ordinance which is going to be upheld under the police

power, under severability because the only portion of it which is facially unconstitutional under the police power or under the Twenty-first Amendment or unconstitutional as applied has to do with topless dancing and anal clefts and that phrase which we will get to a moment. The rest of this ordinance withstands constitutional challenge for the reason that I will mention in a moment.

Well, we left off with the discussion of the first effort under — of the city to get rid of Frank Doran, the Salem Inn establishments.

We have noted that it was on that first effort that we arrived first at the Supreme Court of the United States and there, under the Twenty-first Amendment discussion, assuming that it applied the court said that activity within that local ordinance was plainly within the constitutional protection afforded under the First Amendment which was topless dancing.

Now we took a second try up in the city, in New York state, and there as counsel advised us on the second attempt, the Court, the city tried to limit the scope of its ordinance to some extent, getting over the equal protection problems but attempting to avoid First Amendment problems.

It is interesting to note that in the ordinance itself, the New Hempstead ordinance, under its town code, that is, the following appears in the footnote in that case.

"The Board finds that it is solely within the powers of the State of New York as delegated to the State Liquor Authority," which it is in Florida according to the Florida Supreme Court, "to regulate and control the manufacture, sale and distribution of alcoholic beverages."

And that they could, those purposes which were solely within the power of the state should be augmented in a way not inconsistent with that state power, which is what the people in Lee County did by local regulation of con-

duct of persons engaged in the sale of, to the public, of food and drink and alcoholic beverages, and those persons in their employ. So they said, listen, we realize that we do not have a Twenty-first amendment situation here, that is solely the state's, but we do have police power having to do with conduct.

Therefore, they enacted another ordinance.

The judge, who now on the district level had become efficient in the area, he got the case back probably from one of his brother judges.

Interestingly enough, Judge Bartels at the time he wrote these opinions was about 80 years old, which I find to be interesting also, the Salem Inn cases granting the injunctions. Because he is reading the law, he wasn't going back into his youth. He was reading the law. So the judge himself who wrote it said, "It may best be characterized," talking about this particular dance, "as an exhibition of female breasts to attract bar customers."

That is how he described the expression involved in that case, the judge who granted the preliminary injunction.

"Thus," he says, "we are constrained to hold once again" and he says, "and we might add reluctantly," said the old judge, "that the attempt of the Town of North Hempstead to prohibit topless dancing is on its face violative of the plaintiff's rights under the First Amendment since it includes within its prohibition constitutionally protected expression," referring to what, topless dancing.

Now that case, again, went to the Second Circuit.

You realize that this was a second attempt.

Supreme Court of the United States had already upheld the granting of the preliminary injunction on the first attempt, not on its merits, but rather on upholding the discretion of the trial judge to grant the ordinance, grant the preliminary injunction under the circumstances.

Now, this was the second attempt. Well, the trial judge said that, fellows under your police power, you simply don't have the right to legislate in the area of taste, whether the expression that is being made is tasteful or not and that it, this dancing, this topless dancing is entitled to First Amendment protections.

The case went up to the Second Circuit and again, Judge Oakes my, our Vermont friend wrote this opinion.

He again in the footnote states that it is solely within the power of the State of New York as delegated to the state liquor authority to regulate and this thing is a police power ordinance. It appears in the footnote quoting the ordinance itself.

And then the Court wrote this after permanent injunction had been granted by the Court below. The Court of Appeal wrote this, said that the trial judge entered a summary judgment, permanent injunction, holding that the revised ordinance was still subject to the constitutional vice of First Amendment overbreadth since its sweep includes communicative dancing. Judge Bartels also considered the ordinance to be in violation of the equal protection clause of the Fourteenth Amendment because burlesque theaters might legally operate while others could not, a cabaret could not stage a production, and here is the definitive ruling in all of the courts of appeal on this very question.

It is referred to in the Supreme Court of Florida, cases that counsel cites me, where Florida rejects it and says we don't really need to worry about the constitution as determined by federal courts, the federal constitution. We do not have to follow any federal courts.

Well, interestingly enough I do.

So that really is the answer to your whole case.

Beause this is a federal court. State courts simply say this isn't expression.

It isn't First Amendment even if the federal courts all over the country say it is.

Well, this is a federal court and that is the answer to your question.

Here is the definitive ruling which is, I'll refer to later, in the only Fifth circuit case I can give you on this subject.

Court of Appeals says Judge Bartels found that this ordinance was not justified under any Twenty-first Amendment state power because, it is not involved, there is not involved the kind of conduct properly subject to regulation as a phase of liquor licensing.

So there the Court of Appeals says again the city under its police power does not operate under the Twenty-first Amendment.

They say we agree with Judge Bartels and affirmed him.

Then they are discussing the sweep of the ordinance. This is a Court of Appeals on the second attempt by the City of New Hempstead. "We recognize there is only a modicum of expression involved in the conduct of appellees dancers," topless go-go girls I add, "but that modicum is one of constitutional significance, both to the dancers who earn a livelihood by providing their particular form of entertainment, and, perhaps more, to the customers of the appellees establishment who for a variety of reasons, which may include the lack of economic means or mere differences in inclination, choose not to avail themselves of diversions deemed more tasteful or culturally rewarding than others."

"Judge Bartels," the Court says, "correctly devined our meaning by this that, however much topless dancing may be regarded by some to be in the teeth of good taste, it is, on the record here, a harmless form of diversion or entertainment, by way of communication from one human being to others.

"That interchange of communication is subject to constitutional protection, so long as some legitimate interest of the State or others is not infringed upon."

The Court went on to say that, the town has failed to show any legitimate underlying municipal interest to which its discrimination among various commercial establishments could be rationally related," which has to do with your equal protection proposition.

"The town," wrote the court, "is between the Scylla of overbreadth and the Charybdis of unequal protection."

The town is between this problem of overbreadth and equal protection, which is what I started out to telling you all about the City of North Hempstead moving, trying to move in the middle.

"This is becaue it is attempting to regulate matters which the First Amendment leaves to personal choice."

So there is a case that is precisely our case.

I now turn, because it is in that same context, to Fifth Circuit matters. In the first place, there hasn't been a lot of Fifth Circuit bosom cases.

I expect the reason for that is Younger v. Harris which we do not have in this csae.

In this case before this Court, there is no pending prosecution, there is no pending state case because counsel for the plaintiff somehow or other has very wisely avoided Younger v. Harris.

There is, however, clear evidence in the case of an immediate threat of prosecution, thereby giving rise to the ripeness of this matter and causing, giving rise to our having worked on it rather carefully.

Second reason is that the states have not seen fit to attempt to get rid of topless dancing.

And the states therefore, have not brought into play the Twenty-first Amendment rights.

The State of Florida has not. Only two or three municipalities have attempted to do it within their police power.

Now, my friend who is representing the City read the, —incidently the derivation of the ordinance that you took in Lee County appears throughout all these cases I'm citing. You will see where it came from when you read these cases.

My friend from the City has taken the Lee County ordinance, which the State of Florida through its Supreme Court says is all right because it is within the police power because it doesn't infringe on First Amendment, and drawn an ordinance which could have given rise, if anyone had been arrested under it, to a challenge where the federal constitutionality would have had to have been raised in the state court and the city attorney could simply have shown this carefully drawn ordinance, threw the two Florida cases up on the desk and he would have been in good shape.

That is the simple answer to this.

If the city somehow or other would have federal constitutional questions always decided in first amendment areas by the Florida courts, they would be all right because Florida says this isn't an expression.

But, counsel for the plaintiff, having avoided Younger v. Harris, having avoided, although he has got a civil rights case here, you see, among other matters, having managed to have his people immediately threatened but not arrested, he somehow or other gets the United States courts to construe the United States Constitution and they say without exception that such expression is a First Amendment expression.

Now I want you to bear in mind that we are still talking about facial validity.

We haven't even got to constitutionality as applied here. We are going to get into that in a few minutes.

We start, then, with the language in LaRue.

Well, let's don't get on applied yet, let's cover the rest of Salem Inn where the people who were opposing the city prevailed throughout.

We come down then to they prevailed throughout as against the city, then we come down to 1976, when the city got the state involved.

The State Liquor Control people began to get active because they had some sort of provision in their control law about disorderly conduct and indecent conduct in licensed premises.

So, the city, having been thwarted by the United States Constitution and the First Amendment and the Fourteenth Amendment, then said all right, suppose we bring into play the Twenty-first Amendment which the City of Pompano Beach cannot do. Unless, City of Boca Raton, unless it gets the State Beverage Department involved.

This incidently had to do with topless and bottomless dancing.

But we still got the top of the Areola involved here in the ordinance and there is where the turn came in history of the Salem Inn, because the same fine old district judge who had consistently upheld the First Amendment declined to enter a preliminary injunction because he said at the threshold these statutes don't prohibit nude or topless dancing except upon premises licensed to sell alcoholic beverages and thus this case is entirely different from Doran versus Salem Inn where local ordinances, local ordinances attempted to prohibit topless dancing, et cetera.

Here a new element had been introduced predicated upon the Twenty-first Amendment to regulate the sale and distribution of alcoholic beverages. The Twenty-first Amendment specifically authorizes a broader power of regulation in connection with the sale of alcoholic

beverages which was absent in the three prior Salem Inn challenges.

The district judge held that the position of Salem Inn was such that a three judge court ought to be constituted but that as the individual judge on the three judge panel which gave rise to empanelling the three judge panel he declined to enter the injunction, showing the difference between the state liquor control regulation being under attack bringing into play the Twenty-first Amendment and a police power ordinance.

That case went, as far as I am able to determine and I am sure that I have checked it out carefully, down only to the point where the three judge court ruled, the one which Judge Bartels was of course a member. He was the judge before whom the case fell originally, and the Court said there that because there was an appeal pending in the New York State courts, which of course is not here, discussing Younger v. Harris and the other civil cases, that they weren't going to rule on it because the appeal was pending and I think that was an entirely proper ruling.

And he said that the Inn hasn't been charged with a violation of Rule 36 and it wasn't ripe because there was no immediate threat of enforcement against them and that is why you introduced the testimony that you introduced in this case.

So the end result as far as I am able to determine it is that once the state brought into play the Twenty-first Amendment Salem Inn didn't get its injunction and whatever happened in the state Court of Appeal I don't know.

Now, let me show you some cases that clearly point up the difference in the Twenty-first Amendment case.

1977 case in the Ninth Circuit, Richter versus Alcoholic Beverage Control of the State of California which as an affirmance of a denial of a preliminary injunction. This

was against the State of California as alcoholic beverage control people, a Twenty-first Amendment case.

They held that on its face in consideration of the Twenty-first Amendment, that particular ordinance could stand constitutional scrutiny on its face, specifically left open whether or not as applied, it might be held unconstitutional.

There is a recent case in the Eighth Circuit, a 1978 case, incidentally, November the 13th, 1978. Right there.

It has to do with the tops of areola. I never knew what that was either until a couple of weeks ago.

This bears strongly upon whether or not liquor control law is distinguished from police power city ordinance and this court said that the Twenty-first Amendment conferred something more upon a state than the normal operation of police power, but here is the important thing about the case. It starts out with this sentence.

"It is important to note at the outset that this case is before us in the context of the city's regulatory powers over intoxicating liquors within its borders," and if you read it you will see there is a delegated situation in that particular case.

I want you to read sometime Clark versus the City of Freemont just for fun. That is a 1973 Nebraska case in the District Court which went into great detail on our subject and I won't get into it in depth because I am taking too much time.

But you will find that that district judge far from agreed with his brother who you wanted to cite me.

Another case to read is Felix versus Young.

That is a case that talks about the strict scrutiny and the relaxed standards under LaRue.

Felix v. Young is 536 Fed 2d. 1126.

That case specifically says that the Michigan law authorizes the city to locate places for dispensing liquor.

That was a zoning situation where, in that case, you couldn't have a topless bar if it was a thousand within a thousand feet from two other such establishments or something of that nature. They were not attempting to prohibit the conduct but they were localizing it and, in localizing it, they were under their authority to zone, zoning the things.

In that City of Freemont case, the District Court of Nebraska, the state had specifically delegated the powers to the municipality.

It was a LaRue case and the court ruled the topless part of the thing unconstitutional on its face.

I believe that if you check all the cases carefully, you will find that municipal ordinances absent a delegation of power do not enjoy Twenty-first Amendment protection.

They certainly do if they have been delegated the power.

The scope of sovereignty delegated to municipal courts cannot be enlarged by a liberal construction. The powers conferred upon municipalities by the state are strictly construed.

Water, Light, and Gas company versus Hitchenson 28 Supreme Court 135, and a great many cases, state and federal, cited in footnote 6, on page 248 at section 195, Municipal Corporations AmJur 2d. I won't read you all the cities, but the point is that there has been no such delegation and we know that from reading the statutes and we know it from the Supreme Court's opinion which I have cited.

Now, I do want to discuss a couple of interesting points with you.

I want to talk to you about LaRue because it got involved in our discussions and because my friend from the City of Boca Raton says that there have been some – it is so close to being all right if it has to do with liquor that the City must have Twenty-first Amendment considerations

— and I assume that he says that in good faith, so let's consider the results even if LaRue applied.

In the first place LaRue upheld, considering the Twenty-first Amendment, the ordinance that it upheld on its face.

And it said that in the posture of that case, considering it facially, it could not be said that there wasn't substantial justification for it under the Twenty-first Amendment and it was all right; but it said, however, justification.

The admonition contained in the Court's opinion, SeaGram & Sons versus Hostetter, is equally in point here. This is LaRue now, 1972 case, California.

"Although it is possible that specific future applications may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. Because of the posture of this case, we deal here only with the statute on its face. And we hold that, so considered, the legislation is unconstitutionally valid." They say that at least some of these performances to which these regulations address themselves are within the limit of the constitutional protection of freedom of expression. This being a Twenty-first Amendment case, on its face, it is all right.

Now, when we come to the question of as applied and you get over in the area of some of these methods of conduct that the law ruled out, we are going to have some constitutional problems. That is all that LaRue says to us. It doesn't have anything to do with the application of the regulation.

Now, here is something that is very interesting to me.

This case, which is so often discussed in matters of ordinance that includes topless dancing, and that is so because ordinances generally include more than that, prohibit more than that, as does the one before this Court, the

interesting thing about LaRue is that it, didn't have a thing in the world to do with topless dancing.

Nothing.

It prohibited acts or simulated acts of sexual intercourse, masturbation, sodomy or oral copulation, touching, caressing, fondling of breasts and buttocks, et cetera, displays of the vulva and genitals; didn't, specifically left out topless dancing.

So that all of this discussion by the Court that some of these things we are going to have a prob'em with in the future constitutionally because they may well be within First Amendment protections are those things that I just read, not topless dancing.

Now if any of these may well be as entertainment or First Amendment expressions, constitutionally protected, well certainly topless dancing is. The point is that LaRue didn't have anything to do with topless dancing.

Before I go further with that and show you the interesting thing about the State of California, I want to mention one thing that comes to my mind that has to do with how LaRue is generally discussed.

We even see in one of the cases which I will cite to you where Judge McCree, who I believe now is the, what is he now, solicitor general, wrote a dissent in the Detroit case where the city had been delegated Twenty-first Amendment rights.

And he is talking about LaRue and he gets into this language about gross sexuality as distinguished from mere dancing, topless dancing, that sort of thing.

And three or four of these cases which I'll cite in a moment without discussing this point specifically get into the discussion that says I think this balancing really has to do with comparing gross sexuality with what is occuring in this instance and that sort of thing.

Well, one of the courts and I will tell you what it was in a moment said, no, that is not the problem under the Twenty-first Amendment.

Well, after some study I have come to understand what all those cases are really trying to say, at least I think I do.

They are really trying to say whether or not what is happening is expression, as distinguished from some gross sexual acts, you follow me. They are really dealing with whether or not what is happening is a First Amendment right, and one of cases which I will cite to clarify that in a moment but what LaRue stands for is discussed in every case. It really stands for the proposition that the state under the Twenty-first Amendment, or municipalities if it has been specifically delegated, the state authority may pass broad prophylactic measures reference the sale of whiskey and liquor license rights. And facially they are all right.

But there is a limit to it. They don't overpower other constitutional rights and you have to consider each matter as it comes up, as to whether or not that particular regulation as applied, violates the First Amendment. That is what this LaRue case says.

Now, I am almost finished. It won't be but another moment here.

I want to now show you something interesting that happened in California. Richter in August, 1977, the United States Court of Appeals in the Ninth Circuit wrote an opinion in this general area, Richter versus Department of Alcoholic Beverage Control, the State of California. Did either one of you cite that case?

All right, 559 F.2d 168.

That case which a Twenty-first Amendment case, State of California, determined that the particular ordinances were facially constitutional.

What had happened in this case, was, that case, was that the state set out against these folks.

They said that LaRue had determined only the facial constitutionality of a similar statute, said that because of the posture of the case they haven't dealt with it except on its face, and in general followed LaRue and said the statute was facially constitutional.

Now here is the interesting thing I want to point out to you, just because it is interesting and has no profound effect on this opinion.

In LaRue the portions that were declared unconstitutional had to do with acts of masturbation, sodomy, et cetera, as entertainment, genitals and anuses, actual or simulated. This was a California state regulation, in the LaRue case.

Then, when 1977 came around, which is five years later, the State of California had revised its regulations to some extent.

It took out simulated. It took out the provision that was there in LaRue that had to do with displaying films or pictures because they were concerned of course about Miller and about hearings ahead of time.

And they took out simulate, and left in all of the other provisions that were present in the ordinance or the regulation, that is, that was there when LaRue was written.

The interesting thing about this is that the California plan never did prohibit topless dancing.

None of the cases that came out of California ever had anything to do with topless dancing, including LaRue.

So that these hundreds of references to these things that maybe within the protection of the First Amendment consistently are talking about acts of bestiality, oral copulation, and cares ng anuses and things of that nature.

So how we are looking to LaRue always for topless dan-

cing I will never know because it never was, apparently, prohibited in the State of California.

We come to the Fifth Circuit situation, as I told you I would some day, and I find only that as far as being able to cite anything directly on this area, in the area of First Amendment, a three judge court, district court case. Judge Gee of the Circuit Court was in fact a circuit judge on that three judge court.

This is Kew versus Senter 416 F.Supp. 1101, 1976.

This case has to do with the plaintiff's assorted First amendment rights to dance naked in public barrooms.

The case grows out of efforts by Texas Alcoholic Beverage Commission and the City of Lubbock working with them as they were doing up in Hempstead I guess, to bring criminal and administrative actions against certain individuals involved in topless and bottomless dancing in establishments that had a beverage permit.

The plaintiff alleged that certain sections of the code, the Texas penal code, the Texas statute, was unconstitutionally facially and as applied to nude dancing, First and Fourteenth Amendment.

So this is topless and bottomless.

Now the Texas penal code had to do with what they called indecent exposure, exposing anuses, genitals, offensive gestures, et cetera.

The Court considered the facial challenge and on the overbreadth challenge said it wasn't compelling.

"The behavior condemned here," speaking of the ordinance, or state statute, "falls so far down the scale towards conduct as that treated by these statutes and so far from pure speech, that the overbreadth analysis becomes quite restrictive."

So there we are talking about the scale that counsel wants to talk about.

They say that Doran, now this is the interesting thing

about the three judge case, Doran, the one that I read you a while ago, the sole controlling authority cited to us, is readily distinguishable from Kew versus Senter.

It involves an ordinance making unlawful mere public display of the female bosom by entertainers and says that is what distinguishes this situation from Doran. Doran only has to do merely with the public display of the female bosom by entertainers, et cetera.

The conduct which is condemned here is far more extreme, being in some instances of a sort which approaches if not reaches the actually obscene.

The statutes in question are primarily directed at conduct and of only incidental impact on speech.

There was considerable evidence in that case. They say it is difficult to conceive of ideas entitled to First amendment protection which can be solely or even at best expressed by baring the anus or genitals in the circumstances forbidden by the this statute.

This person was dispensing liquor and everything else while nude. So, what this case is saying is that in this Twenty-first Amendment type case, the statute is constitutional because it is not like Doran, which merely had to do with the exposing bosoms in topless dancing as distinguished from what was happening in this particular case.

So there is a case that you might be interested in. I gave you the cite on it, didn't I?

Now, let's assume for a moment that the Court is wrong and that this is somehow or other a contest between Twenty-first Amendment and First Amendment equal protection.

There is a long line of Fifth Circuit cases, Parks versus Allen, 409 Fed. 2d 210.

Liggett, Atlanta Dowling Center, Hornsby and Allen and others, that have to do with regulation of sales of li-

quor, to do with Twenty-first Amendment matters involving state regulations where the Court, the Fifth Circuit, has held that the liquor licensing procedures themselves were unreasonable and in violation of due process and equal protection.

So the point is that, as expressed throughout the cases, merely because the Twenty-first Amendment is applicable, if it were here, does not mean that you don't have to have some balancing as counsel suggests and I will get into the test of that in a moment.

In view of the fact that I am talking about Parks v. Allen, I will tell you what happened in that case and it is the truth, a true statement.

This case went up and the Fifth Circuit said that there was scant evidence in this regard, as to the reasonableness of the classifications involved in the city ordinance of Atlanta. That was one where they said that they couldn't have two Liquor licenses in one family.

One family is entitled to one liquor license; brothers couldn't hold separate liquor licenses.

The Court said since a determination of the constitutional infirmity of a city ordinance is necessarily a serious matter, we are reluctant to undertake this step without benefit of a well developed record. We remand to the district court for further development of the record on the reasonableness of limiting liquor licenses to one in a family.

Now the only importance of that case is that even if it were a Twenty-first Amendment matter, which it is not, it does not simply ride roughshod over equal protection and First Amendment rights, and that if it were that it would bring into play the test that I think we got originally from O'Brien which the state courts like to cite.

I don't mean just the State of Florida but cited in many state courts. We will talk about it in a minute.

As you remember this was the case where the young fellow burned his draft card.

He was prosecuted in the federal system for having burned his draft card and he said this was a form of speech.

The Court made the statement which is jumped upon by folks who like it, written by Justice Warren, incidentally. This case is certainly correct not only because it is the Supreme Court but because it had to be that way and it is right.

The Court said that, not every conduct, we are not prepared to accept the proposition that everything that somebody said is designed to communicate is speech.

At that point folks who like that quote stop.

But then it talked about a situation where there is an element of speech and conduct combined, not meaning that a fellow had to be talking when he was burning his draft card but he was conveying messages but it was also conduct.

Here in considering topless dancing it is conduct and it is a conveyance of an expression, as we have already held.

There, the Court handed down the test which we see cited in many cases.

Where speech and non-speech elements are combined in the same course of conduct, I say elements, one, the fellow was getting rid of his draft card, two, he was expressing an idea, his opposition to the Vietnam War and to the draft, a sufficiently important governmental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms.

Now, bear in mind that we are now discussing a situation in the interest of completing the ruling. Even if the Twenty-first Amendment were applicable as the city says it is, this ordinance as to the part I am going to mention

precisely in a moment could not stand under the facts of this case.

Here is the meaning of the term sufficiently justified, that is that the governmental interest is sufficiently important, regulating the non-speech elements, the topless dancing, he conduct, where that can limit First Amendment freedoms. Here is the governmental test.

Sufficiently justified if it is within the constitutional power of the government. Two, it furthers an important substantial governmental interest and three, and this would be fatal to the city's case even if the Twenty-first Amendment applied as to topless dancing and the other matters that I mentioned, three, the governmental interest is unrelated to the suppression of free expression.

The governmental interest is unrelated to the suppression of free expression.

And four, the limitation on the First Amendment freedom is no greater than is essential to the furtherance of that interest.

Now the people, the Courts that cite O'Brien and say that it just simply stands for the fact that dancing is not speech, simply do not correctly cite O'Brien.

What O'Brien is saying is that sure, this fellow was expressing himself.

And part of his conduct was First Amendment. However, if there is a sufficient substantial important governmental interest in regulating the non-speech element, that is the tearing up of the card, it can be done constitutionally, but not if the governmental interest is related to the suppression of free expression.

In other words what it says in this case was, okay he is expressing himself but you have to have draft cards in the United States under these circumstances to carry out the entire process of the federal position. People have to register. They have to have their draft cards. There are

million purposes for which they are used, and therefore that is such a substantial governmental interest, that whatever expression came out of his burning it is incidental to his having torn up his draft card.

And therefore, the government interest is unrelated to free expression and a denial of free expression. It is interested in keeping draft cards around because they are vital to the government operation.

Here the interest of the city is in fact directly related because its very purpose is shown in the preamble to the topless dancing which is the expression itself, you see, so that under that test, the city could not meet, simply could not meet it.

Now, we finally come to the most important point evidentiarywise.

If LaRue were applicable, if it was a Twenty-first Amendment type situation, we look to the record to see what governmental interest has been presented by the city.

Just as in the Supreme Court treatment of LaRue, not LaRue, I beg your pardon, of the Salem Inn case, where Justice Rehnquist in anticipating possibilities of prevailing said the petitioner doesn't raise any other legitimate state interests which would counterbalance the constitutional protection.

In most of these cases on the Twenty-first Amendment, there are public hearings and this evidence presented before the liquor control board and all sort of stuff about bestiality and rapes that you find in those, in all these cases; but we look here to the evidence in this case, as the Fifth Circuit tells us we have to do in the case that I mentioned about First Amendment and twenty-first amendment cases or equal protection cases, to see what has been advanced to governmentally justify infringement on First Amendment rights, speaking of the First Amendment.

The evidence in this case, as I recall it, is that a nice man

here who was a police officer, a sergeant, he opined that, and I am not quoting him because I am only recalling it, we believe that motorcycle gangs like to get their girls in places like this, which, would somebody like to correct my recollection?

MR. EISEN: That is accurate.

THE COURT: That is accurate. A new one. That is not very probative.

I don't know what motorcycle gangs are supposed to denote. I see gangs of motorcyclists every Sunday afternoon when I come home from the river fishing.

I guess it is supposed to conjure up some sort of image of big black belts beating people against oak trees or something like that, I remember about ten or 15 years ago about a motorcycle gang.

Now, the point is the evidence, motorcycle gangs we think might want to get their people in here, well, of course, that is not evidence of such justification as to overcome the First Amendment right which we have discussed.

If the city as a matter of fact could have shown factually some tie-in between freedom of expression, meaning the receivers in the bar as well as the dancers and shown somehow or other that motorcycle terrorists somehow had invaded the place through naked bosoms we would be over in the area somewhere of counterbalancing First Amendment rights.

Well, obviously that statement does not rise to the quantum of the showing necessary to override First Amendment protections.

So that even if LaRue were applicable, this portion of the ordinance would be unconstitutional as applied to these particular plaintiffs, this particular plaintiff.

Now there is no need to recite the mere fact that somebody is employing people commercially to make a

dollar denies them his right to bring the action. I think that is absolutely clear in all the cases and some of them which I have cited including Doran.

And merely because the dancers are dancing to earn money, that doesn't take it out of the area of First Amendment rights.

And because somebody is buying beer and paying for it, that doesn't take their First Amendment rights away from them.

So I think that we have pretty largely covered the situation already but we simply leave it at that because it is obvious that this plaintiff had standing and the commercial activity does not deprive any one of a First Amendment right of expression.

Now, as to equal protection, this ordinance on its face, as has to do with the particular area that I shall read in a moment, denies equal protection.

If it were in fact a Twenty-first Amendment case, it would not because the Twenty-first Amendment actually takes out of equal protection those persons who operate bars.

That is what the Twenty-first Amendment is all about.

But just like the people in North Hempstead, if you are not operating under the protection of the Twenty-first Amendment which allows you to zero in on bars as the State of Florida could, then you are faced with equal protection. You are not talking about liquor, you are talking about how come Smith can't have topless dancing when other people down the street can.

Well, the only answer in the world to that is Twenty-first Amendment which is not applicable here for the reasons that we have pointed out, by the city, therefore, just as was the holding in the Kew case.

Well, in any event, I recall it well enough to tell you that the Court finds that the remaining portions of this or-

dinance other than the ones which we will discuss precisely in a moment, fall within the general reasoning and ruling of the three judge court in the Fifth Circuit in the Kew case and the Court although not bound by that decision accepts it as being sound.

And the important thing is that the Kew case did not have to do with those things which are restricted by the portion of the ordinance that the Court is going to declare constitutional in this case. The Court specifically pointed it out that they didn't and distinguished that situation after a full trial on the record from the Salem Inn cases.

Accordingly let's get a copy of the statute, of the ordinance out if you please, sir.

The Court finds that a portion of this ordinance is unconstitutional on its face and as applied after consideration of the facts and the record in this case and of the sparse evidence presented by the city to justify it. That portion of the ordinance which is unconstitutional is that portion which reads as follows:

Section one, which reads that "the City of Boca Raton board of ordinances is hereby amended to include section 4-16 which shall read as follows: we—" that, of course is not unconstitutional. I am simply leading up to the sections that are. Now we have section 4-16.

Number one, which reads, "to suffer, permit any female person, while on the premises of said commercial establishments to expose to public view that area of the human breast at or below the areola thereof."

Number two, it is unconstitutional on its face and as applied is violative of the equal protection and the First Amendment.

Now in number four the words anal cleft as included within that sentence must be removed from that ordinance for the same constitutional reasons already expressed.

Now I understand that in part of the dance, part of the expression, bosoms are exposed and anal cleft. Is that what your evidence showed? That is what your complaint read?

MR. EISEN: We show bosoms.

MR. RANDALL: Buttocks and anal cleft.

THE COURT: Bosoms and buttocks and anal cleft.

And that is what your evidence had to do with. The evidence was that there is clothing on that portion of the body but the behind and the cleft shows right?

MR. RANDALL: Yes, sir.

THE COURT: Although there is some drapery over the thing like a a bikini bathing suit of come nature.

MR. RANDALL: I believe they are commonly referred to as G, G string. They are not entirely bottomless.

THE COURT: Both buttocks and anal cleft come within the evidence, and are within the constitutional ruling and that is in number four.

MR. RANDALL: May I interrupt you for a second, Judge. Are you saying that both buttocks and anal cleft are out?

THE COURT: Anal cleft or cleavage.

MR. RANDALL: Buttocks, anal cleft or cleavage?

THE COURT: That's right. When we get down to it remind me. I believe that question is simply a restriction against the female herself consistent with the one above which has to do with permitting or suffering it, right?

MR. EISEN: That's right.

THE COURT: Right, so that B follows A-1, and it is subject to the same ruling, of course.

Little C in section one folows the three and four provisions above, I believe.

And the same ruling there.

I am going to let you draw me up something on this in a moment. Buttocks, anal cleft or cleavage, that is the

number in letter C, and that also applies to the latter portion of that sentence in C about simulating buttocks or anal clefts or cleavage.

Now, I believe that that covers the entire ordinance consistent with this ruling doesn't it?

MR. RANDALL: Judge, I believe you skipped over section three.

MR. EISEN: It is essentially the same as four.

MR. RANDALL: I assume three are one and the same as four. I believe you skipped over it.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: As to A three under section 4-16, the same terms are constitutionally improper and that has to do with buttocks, anal cleft and cleavage.

And that is in four, right. Subsection four.

We will get it down precisely in a moment.

Now you gentleman will see that if you read the Kew case where Judge Gee was the circuit judge on it, that according to the language of that case whether you are talking about police power or Twenty-first Amendment when you go to talking about genitals and anuses and pubic areas, et cetera, according to that three judge court you are not, you have gone down the scale to the point where you are not talking about First Amendment rights and that consistent with that case is the holding here.

That then means that the question of severability has to come up and I will just take a minute on this.

The question then is whether or not in view of the failure of several portions of the ordinance, the entire ordinance is invalid.

In the first place, there is a severance clause within their ordinance.

Such a clause creates a presumption that eliminating invalid parts a legislature would have been satisfied with

what we had. That is why they, meaning the city in this instance, as Judge Gee put it, the severability clause is in there. Whether or not one was there, well it really wouldn't be controlling.

The question would be as follows.

Would the statute or would the ordinance in question be functionable without the stricken language, and it would be.

And would the alteration of the ordinance so change the scope of the operation of it in a way that the counsel never intended. In other words, would the remaining portion of this ordinance, some how or other, if enforced be contrary to the counsel's intent. Well, obviously that is not the situation.

They were perhaps interested in topless dancing as much as anything else or maybe more but they certainly set about to restrict matters which the Court finds do not fall within the First Amendment and when they put it in there about genitals and anuses I guess was to attempt to proscribe it and therefore it can't be said that it would violate their intent in enacting the legislation.

There is a strong judicial policy to avoid invalidating entire legislation schemes, where the remaining legislation after being cleansed is both operable and reflective of the legislative intent.

It cannot be said here that the city would not have enacted this ordinance had it known that this subsection would be deleted.

Therefore the Court finds that that portion which the Court has found cannot meet constitutional scrutiny can be severed from the remaining portion of the ordinance.

Accordingly the Court upholds the ordinance save for those specific portions which will be severed from it by this Court's final judgment which I will enter forthwith

and accordingly the individually named defendants are hereby permanently enjoined from enforcing those provisions of the ordinance which this court notwithstanding severability findings determines to be unconstitutional under the federal law. The Court does enter an injunction against the City itself which has been joined here by agreement of the parties. That is, it enters it under 1983 based on the Monell case which permits injunctive relief against the enforcement of a city ordinance and 1331, and that is based on the language in the Kenosha case on remand.

And the Court finds that there is a sufficient amount of money in controversy that the jurisdictional requirement of amount in controversy had been met as alleged, and it therefore under, that an amount in controversy having been pled and established to be above the jurisdictional limitation, that under the general jurisdiction of this court in federal questions, under 1331 provisions in the federal code, the injunction is in fact entered also against the city.

So, the result of all of it is that in this dance and in this particular place, as tasteless as it may be in the minds of the majority of the people, that under the federal law and in interpreting the federal constitution the Courts consistently hold that an expression such as this one is in fact entitled to First Amendment protection whether the majority thinks it is tasteless or tasteful.

Finally, the injunction of course should run against all of these named parties, their agents, and those in privity with them.

Of course there is no showing that any of the individual commissioners individually are intent upon enforcing an ordinance, that the injunction has to do with attempted enforcement under the color of law, that being part of the thrust of plaintiff's complaint, so we will officially note that this injunction should run against the individually named defendants in their official capacities. Right.

As I was thinking about this case, I really came to this understanding, that as tasteless as some people may think exposed breasts are as distinguished from arms or legs, the First Amendment is not there to cover everything save free expression regarding sex.

You ever thought of that?

In other words, sexual expression between dancers and viewers is as much protected by the First Amendment as any other kind of expression.

So, people get agitated I guess about sexual expression.

Well, the constitution does not say you can express yourself and give a message on everything else except what might have to do with sex. I guess breasts must have something to do with it because a lot of folks seem to want to go see it. I don't think its because of the baby's milk, you know what it designed for, but in any event the point is that the First Amendment covers sexual expression and interestingly, there it didn't, perhaps the most expression that is going along between any two persons in the whole United States has to do with sex.

First Amendment just about had to cover everything because I expect that there is more communication between men and women not only through speech but through conduct as has to do with sex than any other subject matter. That would be my best estimate on that subject.

So the point is that people get agitated about First Amendment rights because there is something about sex connected with it. Well, sex is simply not restricted. The First Amendment doesn't deal it out.

But really, I think that Judge Oakes put his finger on the whole proposition that in the area of the First Amendment judges have to be very careful that matters of taste do not become rules of law.

Now the injunction of course is orally entered this date at this point in open court and the city is present and

recognizes it and I am sure will abide by it until such time as it may be overturned, so that the final judgment is a matter now of form. However, any appeal from the final judgment would begin to run from the date of the entry of the final judgment in writing. So that for all practical purposes we just announce that today, until the entry of the final judgment, so that your appeal would be, if you have one, will be lined up properly, that this is a preliminary injunction, preliminarily to the entry of the final judgment in writing, and that what you will appeal if you appeal you will appeal the final judgment and that case will start to run then and you wouldn't run into problems of when it starts to run. So for all practical purposes you and your city and the named defendants are preliminarily enjoined consistent with the ruling and the permanent injunction will enter at the time of writing of the judgment.

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE)

I, RUTH M. FEATHERSTONE, Official Court Reporter, do hereby certify that I was authorized and did report the foregoing proceedings of which the pages numbered 1 to , inclusive, constitute a true and correct record of the proceedings before The Honorable JOE EATON, United States District Judge, at the time and place herein specified.

DATED at Miami, Dade County, Florida, this 18 day of January, 1979.

/s/ Ruth M. Featherstone

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Looking Kool – Jolly Trolly, Inc., et al.,	)	
Plaintiffs,	)	Civil No. C 79-136
Thomas C. Kozak, et al.	)	
Plaintiffs,	)	Civil No. C 79-152
vs.	)	
City of Toledo, Ohio, et al.,	)	
Defendants.	)	

OPINION AND ORDER GRANTING PERMANENT INJUNCTION

YOUNG, J:

These actions were filed in March of 1979 and challenged a recently passed ordinance of the City of Toledo prohibiting nude and semi-nude dancing in commercial establishments. Plaintiffs are the operators of two separate establishments which feature nude and semi-nude dancing in essentially a restaurant-type setting. Jurisdiction here is based on 28 U.S.C. §§1331(a), 1343(3), 2201 and 2202. Plaintiffs seeks a declaration that the ordinance in question is violative of First and Fourteenth Amendment guarantees, as well as a permanent injunction prohibiting enforcement of the ordinance.

Initially, after the filing of the complaints, this Court issued a temporary restraining order prohibiting enforcement of the ordinance against the two plaintiff establishments until a hearing could be held. Subsequently, by stipulation of counsel, rather than holding a hearing on

the motions for preliminary injunction, the matter were heard upon the merits. The temporary restraining order has been permitted to remain in force and effect until the Court could address itself to the merits of the controversy. This Court has studied the material submitted by counsel and is now in a position to resolve the merits of this matter.

On February 13, 1979, the City Council of Toledo passed ordinance number 94-79. That ordinance provides:

WHEREAS, it appears that certain establishments within the City of Toledo are engaged in the presentation of nudity and semi-nudity for the purpose of commercial or pecuniary gain; and

WHEREAS, the presentation of nude and semi-nude acts, exhibitions and performances for commercial purposes is adverse to the public health, safety, welfare and morals; and

WHEREAS, it is not the intention of the Council of the City of Toledo to limit the free flow of ideas, opinions, and information, or to impede freedom of speech and expression in the presentation of art or drama, but to prohibit the exhibition of nudity and semi-nudity for its own sake in a commercial context; NOW, THEREFORE,

Be it ordained by the Council of the City of Toledo:

SECTION 1. Chapter 17 of the Toledo Municipal Code be and the same is hereby amended and supplemented by adding thereto Section 17-9-120 to read as follows:

"SECTION 17-9-120. Prohibition of Public Nudity for Commercial Gain.

(A) No person shall participate in a live act, demonstration, performance, play, skit, dance or other exhibition performed before a live audience, in a public place or place open to the public, whether or not a fee is charged for admission, and recklessly do any of the following:

(1) Expose his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region, or pubic hair region;

(2) Expose any device, costume or covering which gives the appearance or simulates the genitals, pubic hair, buttock, natal cleft, perineum, anal region, or pubic hair region;

(3) Expose any portion of the female breasts at or below the areola thereof.

(B) No person shall cause, permit, solicit, procure, aid or abet, counsel or assist any person to commit an offense as prohibited in Division (A) of this Section.

(C) Nothing contained in this Section shall be construed to apply to the exhibition, presentation, showing or performance of any play, ballet, drama, tableau, or production in any theater, concert hall, museum of fine arts, school, institution of higher learning or similar establishment which is primarily devoted to such exhibitions, presentations, shows or performances as a form of expression of opinion, communication, speech, ideas, information, art or drama as differentiated from commercial or business advertis-

> ing, promotion or exploitation of nudity for the purpose of advertising, promotion, selling or serving products or services or otherwise advancing the economic welfare of a commercial or business enterprise such as a hotel, motel, bar, nightclub, restaurant, tavern or dance hall.

Whoever violates this Section is guilty of a misdemeanor of the third degree."

At the outset of its consideration of the issues here, the Court notes that no parallel criminal proceedings involving this ordinance are pending in the state courts. Therefore, the Court need not consider the impact of the judicial abstention doctrines on the present controversy. *See, Younger v. Harris,* 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941). Nonetheless, the threshold question of federal jurisdiction, whether an actual controversy exists, must be addressed. It appears to the Court, and for purposes here the Court finds, that the activities of the plaintiff institutions would subject them to prosecution under the ordinance. The Court finds, in addition, that a substantial controversy exists among the parties regarding the construction and constitutionality of the ordinance and thus that the "case or controversy" requirements of Article III of the Constitution have been met. *Steffel v. Thompson,* 415 U.S. 452 (1971); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Wooley v. Maynard,* 430 U.S. 705 (1977).

Before proceeding to the merits of the controversy, some description of the two establishments is in order. The Looking Kool – Jolly Trolly is located in a shopping complex in a highly commercial area. Numerous restaurants, gas stations and department stores are in the immediate

area. In addition, near the restaurant is a large "supermarket" grocery store, a disco-dance establishment, massage parolor and an "adult" movie and book store. The Jolly Trolly displays only a moderately sized sign to denote its location. No pictures depicting nudity or semi-nudity are displayed, and no part of the performance can be seen from the street or parking areas. In addition, a sign is displayed near the door which indicates nude and semi-nude dancing takes place therein and that only adults are permitted to enter.

The exterior of the Toledo Nude Theatre is not markedly different from that of the Jolly Trolly. It was indicated that there too a sign is displayed advertising the dancing and restricting admission to adults. No pictures are displayed and no part of the performance can be seen from the street. There is no evidence in the record to indicate that juveniles have been permitted to enter the establishments or that the exteriors of the buildings, including the signs, have a significant impact on this litigation.

Admission to the establishments requires the paying of a "cover charge." This fee gains admission and entitles the patron to a seat at a table. Charges for food or drink are over and above the admission fee.

The interiors of both establishments appear to be arranged in similar fashions. Ordinary restaurant tables and chairs are scattered throughout the facilities and patrons take their seats there. Each restaurant has a separate menu of food and drink items which are served by waitresses. The waitresses, however, are not part of the dancing featured at the establishments and do their jobs in ordinary waitress uniforms. No alcoholic beverages are served in either place of business. The menus are confined to a

selection of sandwiches, "short-order" items and a variety of soft drinks and non-alcoholic beverages.

The main attraction at both facilities, of course, is the dancing. Each facility employs at any one time six to eight dancers for the afternoon and evening performances. Each is paid either on a weekly basis or per performance. Generally speaking, each dancer performs his or her act on a raised stage in a central location in each facility. Each dancer peforms to a set of three popular songs of approximately five minutes each. A female dancer steps on the stage wearing usually a gown, "jump suit" or similar stage costume and begins to dance. During the first record, the dancer is fully attired. During the second round, the dancer removes the upper clothing and finally, during the last record, removes all clothing and dances in the nude. Before leaving the stage, the dancer dresses. According to the testimony, no nudity or semi-nudity is permitted in the establishments off of the stage.

The variety of dancing as displayed in the video-taped sequence is unlike that traditionally associated with burlesque or with "go-go" dancing. Generally, it can be described as modern dance which features flowing arm movements and steps timed to the music. Particularly noticeable to the Court was the lack of movement which could be called suggestive or overly provocative. The evidence established that the dancers are not permitted by the management to use such movements. In short, the dances were not wholly dissimilar from those dances which are commonly performed and publically accepted except that the performers dance nude or semi-nude.

The thrusts of the attack on the ordinance follow two routes. One one hand, plaintiffs contend that the activity which the city seeks to regulate is protected by the First

and Fourteenth Amendments. On the other hand, plaintiffs contend that the distinction made in the ordinance between "a public place or place open to the public" and a "theatre, concert hall, museum of fine arts, school, instruction or higher learning or similar establishment" is violative of the Equal Protection Clause. It should be noted that the city's ordinance makes no attempt to distinguish between obscenity and nudity. All nude performances in appropriate establishments are banned regardless of whether such performances would be classifed as obsence, and thus, the ordinance suffers from overbreadth. These contentions cannot be dismissed summarily.

Every student of constitutional law is familiar with the gradual development of the concepts which underpin this portion of the law. The current leading line of authority is derived from the Supreme Court decision in *Miller v. California,* 413 U.S. 15 (1973). There, new ground was broken as the Court moved away from the standards of obscenity arising from *Hemoirs v. Massachusetts,* 383 U.S. 413 (1966). Under the *Miller* rationale, the inherent dangers of regulating forms of expression are recognized. To be constitutionally acceptable, a state offense must be specifically defined and must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which do not have serious literary, artistic, political or scientific value. 413 U.S. at 7A.

This Court is aware in these cases that what is at issue here is a live performance and not a book, magazine or film. A book serves to have a different and preferred place in our hierarchy of values and so it should. *Kaplan v. California,* 413 U.S. 115, 117 (1973). Nonetheless, the reasons of *Miller* are applicable here and weigh in this

decision. Chief Justice Burger, writing for the majority in *Miller,* reasoned that "[s]ex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." 413 U.S. at 25-26. In a footnote to that sentence, the Chief Justice added:

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien,* 391 U.S. 367 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and non-speech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of the free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *See, California v. LaRue,* 409 U.S. 309, 117-118 (1972)
> *Miller v. California, supra* at 26 n.8.

Both cases cited in the footnote involve issues which do not arise in these cases now pending before this Court. In *United States v. O'Brien, supra,* the defendant was convicted of having burned his draft card. The Court found that statutory scheme to be an appropriately narrow means of protecting the government's interest in continuing the availability of issued Selective Service cards and to have condemned only the independent non-communicative impact of conduct within its reach. Thus, while not all

conduct is speech merely because it is designed to be communicative in some way, the frustration of a sufficient governmental interest served to justify the conviction. In a more similar setting, *California v. LaRue, supra,* the Court upheld regulations controlling the type of entertainment permitted in California bars and nightclubs. The regulations were before the Supreme Court not in the context of censoring a dramatic performance in a theatre, but rather in the context of licensing bars and nightclubs to sell beverage alcohol by the drink. 409 U.S. at 114. The Twenty-First Amendment was recognized as conferring on the states something more than the normal state authority over public health, welfare, and morals. *Id. See, Salem v. Liquor Control Comm.,* 34 Ohio St.2d 244, 298 N.E.2d 138 (1973).

Certainly as the mode of expression moves from the printed page to the commission of public acts that may themselves violate penal statutes, the scope of permissible state regulations significantly increases. *California v. LaRue, supra* at 117. The Supreme Court in *O'Brien, supra,* suggested that the extent to which conduct, as that relates to "symbolic speech," was protected depended on a "communicative element." Then Chief Justice Warren wrote "We accept the view that an apparently limitless variety of conduct can be labeled 'speech' wherever the person engaging in the conduct intends thereby to express an idea." 391 U.S. 376. Further, in *California v. LaRue, supra,* Mr. Justice Rehnquist wrote:

> The substance of the regulations struck down [incorrectly in the court below] prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at

> least some of the performnces to which these regulations address themselves are within the limits of the constitutional protections of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink. 409 U.S. at 118.

The acts sought to be regulated in *LaRue,* and indeed the situation which gave rise to the need to regulate, are not present in the record of the instant case. California sought generally to prohibit the performance of acts of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law" and the actual or simulated "touching, caressing or fondling of the breast, buttocks, anus or genitals." 409 U.S. at 111-12. On the basis of the record before this Court, the Court finds such activities do not take place at the plaintiff establishments. On the contrary, the evidence indicates that the dance routines are merely nude or semi-nude, but otherwise acceptable. There is no featuring of the type or variety of activity which California sought to regulate, but, on the contrary, the performers were not permitted to perform or simulate such activities.

The sweep of the ordinance in question is impermissibly broad. It is focused on nudity and semi-nudity and not on obscenity. It can be applied to communicative dancing and theatrical productions just because they involve nudity and are performed in certain locations. In dealing with the First Amendment freedoms, only obscenity is not entitled to protection. Thus, on its face, the ordinance is overbroad.

In an action more similar to the instant one, the California Supreme Court upheld ordinances which prohibited both nude waitresses and dancers. *Crownover v. Husick,* 107 Cal. Rptr. 681, 509 P.2d 497 (1973), *cert. denied, sub nom., Owen v. Husick,* 415 U.S. 931 (1974). While the views expressed in Crownover have been applied elsewhere, *Fortland v. Derrington,* 253 Ore. 289, 451 P.2d 111 (Ore. 1969); *Yauch v. State,* 109 Ariz. 576, 514 P.2d 709 (1973); *Seattle v. Hinkley,* 83 Wash.2d 205, 517 F.2d 592 (1973), this Court is not compelled to apply the decision here. The problems which gave rise to the regulations, nude or semi-nude waiters, waitresses and performers mingling with customers, are not present here.

This Court is reluctant to draw fine lines of distinction between what are artistic presentations and what are not. The Supreme Court likewise has not erected guidelines for what is a theatrical production. *See, Schact v. United States,* 398 U.S. 58 (1970). The First Amendment was designed to encompass more than conventional theater in the same manner it was designed to encompass more than politically popular speech . . . . a method of expression may be presented happens to be in a commercial establishment does not strip it of constitutional protection. Ordinances which overbroadly infringe on protected activity may not withstand subjection to constitutional challenge.

This Court recognizes that to many there may be only a modicum of expressin involved in the activity of the plaintiffs' dancers. But that modicum is one of constitutional significance to the plaintiffs, plaintiffs' dancers and to the public. *Salem Inn, Inc. v. Frank,* 522 F.2d 1045 (2d Cir. 1975). The defendants' attempt to prohibit the activities of the plaintiffs may not stand in the face of the First Amendment. On the basis of the record before it, the Court finds that the activities in the plaintiff estab-

lishments involve a communicative element which entitles them to First Amendment protection and that the plaintiffs' First Amendment claims support the granting of a permanent injunction.

Turning to the equal proctection claim, the ordinance in question attempts to exclude from coverage theatres, concert halls, museums of fine arts and the like while prohibiting this form of dancing in other commercial establishments. Plaintiffs contend that because fundamental interests are at stake, "strict scrutiny" of the ordinance must be made. To withstand attack, a compelling state interest must be shown. Defendants on the other hand, contend that because the ordinance is directed only at nudity, merely a rational relationship to a legitimate state interest must be shown.

This Court agrees with plaintiffs that even the modicum of expression involved in the activity places its case on a plane where the ordinance must be subjected to strict scrutiny. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Salem Inn, Inc. v. Frank,* 522 F.2d 1045 (2d Cir. 1975). But see, *Crownover v. Husick, supra.* The City has made no compelling justification for the distinction between theaters, museums and the like and other commercial establishments. Profitability hardly seems a compelling state interest on which to justify the distinction. While the plaintifs have indicated that profits have been made in their operations, similar profits may also be made in theaters or museums of fine art, and yet these institutions would not fall within the purview of the ordinance. Even if the defendants' rational relationship test were applied, the City has failed to establish any legitimate underlying municipal interest in distinguishing between commercial and supposedly non-commercial establishments. *Salem Inn, Inc. v. Frank,* 522 F.2d 1045 (2d Cir. 1975).

Under certain circumstances, the City has inherent police powers which can be mustered to promote the public welfare and morals. The instant ordinance, however, makes impermissible distinctions which are without support or foundation. "If the [City] is between the Scylla of overbreadth and the Charybdis of unequal protection, it is because it is attempting to regulate matters which the First Amendment leaves to personal choice." *Id.* at 1049.

This opinion and order will serve as the Court's findings of fact and conclusions of law.

THEREFORE, for the reasons stated, good cause appearing, it is

ORDERED, DECLARED AND DECREED that ORDINANCE NUMBER 94-79 of the City of Toledo, Ohio is overbroad, is in violation of the First and Fourteenth Amendments and is in violation of the Equal Protection Clause of the United States Constitution; and it is

FURTHER ORDERED that the defendant City, its agents, servants, employees and assigns and all those acting in concert therewith are hereby ENJOINED from enforcing ORDINANCE NUMBER 94-79 of the City of Toledo, Ohio; and it is

FURTHER ORDERED that the clerk shall enter judgments in accordance herewith.

IT IS SO ORDERED.

/s/ L. J. Young
United States District Judge

Toledo, Ohio.
April 26, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERNARD HUGHES,
TINA M. EMMART, Civil No. HM80-371
IRENE HUGHES,
t/u/o CROLINA RESTAURANT, INC.
t/a THREE CAPTAINS HOUSE OF
SEAFOOD

v.

SUSANNA K. CRISTOFANE, MAYOR:
JOSEPH GALLAGHER, COUNCILMAN:
LARRY T. LYONS, COUNCILMAN;
TIMOTHY J. McNAMARA,
COUNCILMAN; WILLIAM R. SEYMOUR,
COUNCILMAN

Filed: February 22, 1980

Russell W. Shipley, Esquire, of Landover, Maryland and Lawrence N. Taub, Esquire, of Landover, Maryland, Attorneys for Plaintiffs.

James E. Kenkel, Esquire, of Upper Marlboro, Maryland, Attorney for Defendants.

Herbert F. Murray, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERNARD HUGHES, t/a THREE CAPTAINS HOUSE OF SEAFOOD, et al.	:	Civil No. HM80-371
v.	:	
SUSANNA K. CRISTOFANE, MAYOR, et al.	:	

. . . cOo . . .

MEMORANDUM OPINION

The plaintiffs are the owners and major shareholders of the Three Captains House of Seafood Restaurant in Bladensburg, Maryland; the defendants are the mayor and town councilmen of Bladensburg. The plaintiffs, whose restaurant has until recently provided entertainment in the form of "topless" dancing, seek a temporary restraining order enjoining enforcement of a recently-enacted Bladensburg town ordinance which prohibits such entertainment in establishments that serve alcoholic beverages or food. After hearing oral argument on the matter from both sides, and having considered the applicable law, the court has concluded that the restraining order should issue as the plaintiffs have requested.

The ordinance in question, Ordinance 3-80, first recites the concern of the residents and Town Council of Bladensburg with the "many problems" incident to the operation of businesses serving alcoholic beverages or food and providing "topless or semi-nude entertainment." The language contains no specific explanation of what the "many problems" are. Invoking the Council's "broad

police powers and licensing powers," the ordinance then requires that "all businesses offering live entertainment and serving alcoholic beverages or food" obtain a town entertainment license. The law goes on to proscribe the following conduct:

> 2. *Attire of performers and food or beverage servers in Licensed Premises* – It shall be unlawful for any person serving food or alcoholic beverages, or performing for the public, or whose duties consist primarily of dancing, walking or posing before customers, in any business required herein to be licensed, whether during the performance or at any time while on the premises of such licensed business, to publicly and knowingly display:
>
> a. The genitals or any portion thereof.
> b. Any portion of public [sic] hairs, including the shaved pubic hair line or area.
> c. The buttocks, including any portion of the cleavage between the buttocks.
> d. Any portion of the areola or papilla of the female breast or any area of the female breast below said portions.
>
> 3. *Conduct of performers and food or beverage serves in licensed premises* – It shall be unlawful for any person serving food or beverages, or performing for the public, or whose duties consist primarily of dancing, walking or posing before customers, while on the premises of such licensed business to publicly and knowingly:
>
> a. Commit or simulate any sexual act such as sexual intercourse, masturbation, fellatio,

cunnilingus, sodomy or any unnatural sexual act, whether acting alone or with any other person.

b. Sit, drink, or dine with any patron or perform closer than six (6) feet from any patron.

c. Contact any person or other performers by touching, caressing or fondling the breast, buttocks, anus or genitals of any patron or other performer.

Any person who engages in any of the proscribed conduct, or suffers the conduct to be engaged in on licensed premises, is subject to a fine or imprisonment or both, and to possible revocation of his or her entertainment license. The plaintiffs contend that the ordinance is overbroad, and that it deprives them of their rights under the first and fourteenth amendments to the Federal Constitution. Their claim is brought under 42 U.S.C. §1983.

The initial question for a federal court confronted with a challenge to the constitutionality of a state or municipal ordinance is whether considerations of comity and federalism require the court to abstain from deciding the matter until an appropriate state court has had an opportunity to resolve the dispute. *Younger v. Harris,* 401 U.S. 37 (1971); *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941). The court does not find abstention appropriate in this case under either the *Younger* doctrine or the *Pullman* doctrine.

According to the principles of *Younger,* a federal court should not enjoin any state criminal or civil proceeding pending against the party seeking federal relief. *Younger v. Harris, supra; Huffman v. Pursue,* 420 U.S. 592 (1975); *Juidice v. Vail,* 430 U.S. 327 (1977). The rationale of the

Younger doctrine is that a federal court should not interfere with an ongoing state proceeding before the state forum has had an opportunity to decide the matters at issue. However, in the present case, none of the three plaintiffs is presently involved in a state court proceeding of any kind. Furthermore, the plaintiffs have satisfied the court that the threat of their being prosecuted under Ordinance 3-80 is substantial and immediate. *Younger v. Harris, supra,* 401 U.S. at 41-42; *Steffel v. Thompson,* 415 U.S. 452, 458-59 (1974). Three of the dancers employed by the plaintiffs have already been arrested under the new law, and since the last arrest on February 14th, the police have visited the plaintiffs' restaurant at least once a day. Although the dancers have apparently been instructed to wear halter tops in order to comply with the ordinance, the court finds that the three arrests already made and the repeated visits of the police create enough of a threat of prosecution to give the plaintiffs standing in this court.

Because the plaintiffs have made out a justiciable case or controversy, and are not involved in any pending state proceedings, nothing in the *Younger* line of cases prohibits this court from granting the relief requested.

Similarly, the court can find no basis for abstaining under the "*Pullman* doctrine." If the law at issue were subject to two interpretations, and a state court might therefore be able to interpret it in such a way as to avoid any constitutional issue, this court would take no action until the state court had had an opportunity to consider the ordinance. *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *United Steelworkers of America v. Bagwell,* 383 F.2d 492 (4th Cir. 1967). However, this court finds the law to be susceptible of only one meaning, which unambiguously raises the constitutional issues discussed below. Accordingly, abstention is inappropriate.

In order to obtain relief by a temporary restraining order under Rule 65 of the Federal Rules, the plaintiffs must show:

(1) that unless the restraining order issues, they will suffer irreparable harm;

(2) that the hardship they will suffer absent the order outweighs any hardship the defendants would suffer if the order were to issue;

(3) that they are likely to succeed on the merits of their claims;

(4) that the issuance of the order will cause no substantial harm to the public; and

(5) that they have no adequate remedy at law.

See Blackwelder Furniture Co., Etc. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). *See also Thompson Van Lines, Inc. v. United States,* 381 F. Supp. 184 (D.D.C. 1974); *North Carolina State Ports Authority v. Dart Containerline Co., Ltd.,* 592 F.2d 749 (4th Cir. 1979). The plaintiffs have satisfied each of the prerequisites.

If a restraining order did not issue, the owners of the Three Captains Restaurant would suffer irreparable harm both to their financial interests and to their interest in the free exercise of constitutional rights. According to the affidavit of plaintiff Bernard Hughes, filed with the court on February 20, 1980, the gross income of his restaurant was "generally" over $1000 and rarely less than $800 per day before he clothed his dancers on February 14th in order to comply with Ordinance 3-80. Since he has complied, the business has averaged $700 a day. Because Mr. Hughes requires at least $750 to $800 gross income per day to meet expenses, he has been operating at a loss since the topless

dancing ceased. He anticipates that his business may fail if the dancers must continue to comply with the ordinance. Other courts have found that loss of revenue, when specifically described, constitutes irreparable harm, and this court believes Mr. Hughes has made an adequate showing under that standard. *Salem Inn, Inc. v. Frank,* 408 F. Supp. 852 (E.D.N.Y. 1976). *Cf. Frejlach v. Butler,* 573 F.2d 1026 (8th Cir. 1978); *C'est Bon, Inc. v. North Carolina State Board of Alcoholic Control,* 325 F. Supp. 404 (W.D.N.C. 1971).

More importantly, the plaintiffs have made an adequate showing that if enforcement of the ordinance is not enjoined, the law might operate to infringe the first and fourteenth amendment freedoms not only of the plaintiffs, but also of other proprietors and entertainers subject to the law's requirements. Such a showing satisfies not only the irreparable harm requirement, *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir. 1978), but also the likelihood-of-success requirement.

In the first place, the weight of authority in the federal courts is that nude dancing which cannot be characterized as obscene is a form of expression entitled to some protection under the first amendment. *California v. LaRue,* 409 U.S. 109 (1972); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Salem Inn v. Frank,* 522 F.2d 1045 (2d Cir. 1975); *Attwood v. Purcell,* 402 F. Supp. 231 (D. Ariz. 1975); *Clark v. City of Fremont,* 377 F. Supp. 327 (D. Neb. 1974); *Wood v. Moore,* 350 F. Supp. 29 (W.D.N.C. 1972). *See also Maita v. Whitmore,* 365 F. Supp. 1331 (N.D. Cal. 1973), *rev'd on other grounds,* 508 F.2d 143 (9th Cir. 1974), *cert. denied,* 421 U.S. 947 (1975) (conduct not protected because obscene). *But see Paladino v. City of Omaha,* 335 F. Supp. 897 (D. Neb.), *aff'd on different*

reasoning, 471 F.2d 812 (8th Cir. 1972); *Hodges v. Fitle,* 332 F. Supp. 504 (D. Neb. 1971). Although several state courts have held nude dancing not to be protected under the first amendment, those cases are arguably distinguishable on their facts, and do not necessarily support the proposition that topless dancing *per se* is never protected expression. *See* the cases collected in 49 A.L.R.3d 1084 (1973).

The defendants in this case cite *California v. LaRue, supra,* 409 U.S. 109 (1972), as authority for their argument that topless dancing is at best only minimally protected, and may be broadly regulated in connection with the consumption of alcohol. The Supreme Court in *LaRue* held that a state's broad powers under the twenty-first amendment to regulate distribution of alcohol gave the state similarly broad discretion to curtail nude entertainment where alcohol was served, even if the entertainment might in certain circumstances fall within the sphere of the first amendment. In light of the state's broad authority, the Court applied a rational relationship test to the challenged California law, and found it to be rational. 409 U.S. at 118.

The facts of the present case are sufficienlty distinguishable from those of *LaRue* to persuade this court that *LaRue* may not defeat the plaintiffs' first amendment claims. As far as the court has been able to determine, the Town of Bladensburg does not have any regulatory powers under the twenty-first amendment. The authority to issue liquor licenses of Bladensburg is vested in the Board of License Commissioners for Prince George's County. MD. CODE ANN. Art. 2B, §§1, 60 (1976). That board issued the plaintiffs' lqiuor license with no restrictions on nude entertainment. As the Eighth Circuit held in *Felix v. Young,* 536 F.2d 1126 (8th Cir. 1976),

where the twenty-first amendment is not implicated in the regulation of nude entertainment, a stricter standard of scrutiny is required.

The plaintiffs have also made an adequate showing that Ordinance 3-80 may be unconstitutionally overbroad, and may violate principles of equal protection. *Salem Inn, Inc. v. Frank, supra,* 522 F.2d 1045 (2d Cir. 1975). The law purports to prohibit topless dancing in all business establishments serving liquor *or* food. Even if *LaRue* were otherwise applicable, the defendants have made no showing that first amendment activity can be constitutionally curtailed merely because food is served on the premises. Furthermore, the language of the ordinance on its face may sweep in activity which is clearly entitled to first amendment protection, such as performance of the play "Equus" at a legitimate dinner theater. As for the equal protection problems, the defendants have not satisfactorily explained why there is even a rational basis for, much less a compelling state interest in discrimianting between an establishment that offers food and nude entertainment, and an establishment that offers such entertainment with only soft drinks or no refreshment at all. Although the court voices no opinion about the ultimate outcome of the case, the constitutional issues raised are substantial enough to justify affording the plaintifs temporary relief.

The defendants argue that the "separability clause" is sufficient to save the ordinance. The clause states that if any part of the law should be found unconstitutional, that part shall be deemed a separate and independent provision. Howver, even if the words "or food" were eliminated from the ordinance, the town's powers under the twenty-first amendment would still be in doubt, and serious constitutional problems would remain. Nor does the court see

how the equal protection problems could be cured by even radical surgery.

Similarly, there is no merit to the defendants' claim that because the law is constitutional as applied to these plaintiffs, they lack standing to challenge it. Even assuming the plaintiffs are in the posture the defendants allege, it is well-established that a plaintiff who alleges the overbreadth of a statute may maintain an action although the law may be constitutional as applied to him. *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Doran v. Salem Inn, Inc., supra,* 422 U.S. 922 (1975).

Given the plaintiffs' substantial showing of threatened irreparable harm, it is not difficult to conclude that the balance of hardships tips in the plaintiffs' favor. If the temporary restraining order should issue, the only resulting hardship to the defendants will be a return to the status quo before the ordinance took effect. Because the defendants have not shown that the status quo injured anything other than their moral sensibilities, the court feels that the importance of the plaintiffs' constitutional rights outweighs the defendants' interests.[1] For the same reasons, the court finds that enjoining the enforcement of Ordinance 3-80 will not substantially harm the public interest.

The plaintiffs have also satisfied the court that they have no adequate remedy at law. If the status quo is not preserved, the passage of time required to litigate the plaintiffs' claims will work the irreparable injury the plaintiffs have described.

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[1]The court does not mean to imply that the town's moral concerns are frivolous, but only that they are not of constitutional dimension.

The plaintiffs have thus met all the prerequisites for obtaining a temporary restraining order. The court is mindful that the remedy is an extraordinary one, but is persuaded that the case presents the urgency and special circumstances that make extraordinary relief necessary.

Accordingly, the Town of Bladensburg and its agents will be temporarily enjoined from enforcing Ordinance 3-80, and the court will issue a separate order to that effect. However, nothing in this opinion or in the order should be deemed to affect any state proceedings stemming from enforcement of the ordinance prior to today's date.

/s/ Herbert F. Murray
United States District Judge

Dated: February 22, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERNARD HUGHES, et al. t/a THREE CAPTAINS HOUSE OF SEAFOOD, et al.	:	Civil No. HM80-371
v.	:	
SUSANNA K. CRISTOFANE, MAYOR, et al.	:	

. . .oOo . . .

For the reasons set forth in the Memorandum Opinion dated this 22nd day of February, 1980, it is this same date, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the plaintiffs' request for a temporary restraining order be, and the same hereby is, *Granted;*

(2) that effective immediately, defendants Mayor and Councilmen of the Town of Bladensburg and their agents be, and the same hereby are *Restrained* from enforcing Ordinance 3-80 of the Town of Bladensburg for a period of ten days from the date of this Order;

(3) that plaintiffs give security by filing forthwith with the Clerk of this Court a bond in the sum of $500.00 for the payment of such costs and damages as may be incurred or suffered by defendants if found to be wrongfully enjoined or restrained;

(4) that this matter be heard on plaintiffs' request for

preliminary injunction at 4:30 p.m. on Monday, March 3, 1980; and

(5) that the Clerk of the Court mail a copy of this Order and the accompanying Memorandum Opinion to each of the parties.

/s/ Herbert F. Murray
United States District Judge

DENNIS BELLANCA, d.b.a. THE MAIN EVENT, et al., respondents, v. NEW YORK STATE LIQUOR AUTHORITY, et al., appellants.

Decided June 10, 1980

Before *Cooke, Ch.J.; Jasen, Gabrielli, Wachtler, Jones, Fuchsberg* and *Meyer, JJ.*

Robert Abrams, Attorney General (Peter J. Dooley and Shirley . . .

George P. Doyle, Buffalo, N.Y., for respondents.

[BNA Date Filed: 6-10-80 Date Received: 7-16]

Wachtler, Jr. — The question on this appeal is whether a provision of the Alcohol Beverage Control Law (se. 106, subd. 6-a) is unconstitutional insofar as it prohibits topless dancing at premises licensed by the STate Liquor Authority. The Supreme Court, Erie County, held this portion of the statue unconstitutional. The State has appeAled directly to this court pursuant to CPLR 5601(b)(2).

The plaintiffs are the owners of nighclubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. That agency has adopted rules prohibiting nudity and "lewd or indecent conduct" on premises licensed to sell alcohol.[1] The rules also specifically prohibit the licensee from permitting "any female" to appear with breasts "expose[d] to view" but, as originally adopted, contained an exception for topless dancing which, although not prohibited, was subject to strict regulation.[2]

In 1977 the Legislature added nearly identical provisions to the Alcoholic Beverage Control Law (L. 1977, c. 321, sec. 1). However, this statute [Alcoholic Beverage Control Law, sec. 106, subd. 6-a) did not carry forward the exception permitting topless dancing.[3] No criminal penalty is provided for violating this statute (see Alcoholic Beverage Control Law, sec. 130[3] and [5]). But a violation of this law may result in a loss of the liquor license (9 NYCRR 53.1[s]).

The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a is unconstitutional to the extent it prohibits all topless dancing at premises licensed by the State Liquor Authority. The plaintiffs stated that they had always complied iwth the Liquor Authority's rules and restrictions with respect to topless dancing. In addition it was alleged that this activity is not observable from the public streets and the fact that it is featured is clearly noted on signs posted outside the plaintiffs' premises. "Consequently," the complaint states, "no person has been exposed to topless dancing performances at plaintiffs' premises except by choice." In their first cause of action they argue that the topless dancing featured at their establishment "is not lewd or obscene within the meaning of the United States Constitution and is a form of protected expression under the First Amendment." In the remaining three causes of action the plaintiffs claimn that subdivision 6-a is also overbroad, violates the equal protection clause and infringes on their freedom of expression guaranteed by Article 1, section 8 of the State Constitution. They therefore asked the courts to declare subdivision 6-a unconstitutional to the extent that it prohibits topless dancing in licensed premises and also sought an injunction barring the State from enforcing this law in the future.

In response the State contended that "notwithstanding the constitutional provisions which guarantee freedom of expression" it may, pursuant to the Twenty-first Amendment of the United States Constitution "regulate the type of entertainment in establishments licensed in this State to sell alcoholic beverages."[4]

The trial court recognized the State's broad power to control and regulate the sale of liquor in order to protect the public from its effects (*California v. LaRue,* 409 US 109). It found, however, that topless dancing is "a type of expression protected by the First Amendment" and that the States had failed to "show some serious and compelling reason to limit it. Bland reliance on the Twenty-first Amendment is insufficient." Thus the court declared subdivision 6-2 unconstitutional as applied to topless dancing in licensed premises, and to that extent, enjoined its enforcement.

On this appeal the State contends that this judgment is inconsistent with the United States Supreme Court's holding in *California v. LaRue (supra).*

In *LaRue* the Court held facially valid certain administrative rules regulating the type of entertainment that might be presented in bars and nightcluibs licensed by the State. The rules prohibited what the Court described as acts of "gross sexuality" including display of the genitals and live or filmed performances of sexual acts. They noted that before the rules were promulgated, hearings were held and it was shown that at premises where these acts were performed, "numerous incidents of legitimate concern to the Department had occurred" (*California v. LaRue, supra,* p. 111). These incidents included "bacchanalian revelries" involving public sexual acts betwen customers

nad entertainers, as well as assaults, rape and indecent exposure committed at or near such premises.

In upholding the regulations the court observed that the Twenty-first Amendment, granting the States power over the sale and distribution of liquor within their borders, has been recognized as conferring on the States something more than the normal authority inherent in the public power. Although that amendment did not nullify the other provisions of the Constitution whenever the State seeks to regulate the sale of liquor, it did serve to "strengthen" the State's authority in that particular area. The court conceded that some of the performances prohibited by the regulations would be entitled to constitutional protection but noted tht the regulations claimed to be invalid on their face, in "substance" prohibited performances "that partake more of gross sexuality than of communication" (*California v. LaRue, supra,* p. 118). The State's conclusion that these acts should not be permitted at places authorized to sell liquor was held not to be "an irrational one" in light of "the evidence from the hearings" *(California v. LaRue, supra,* pp. 115-116, 118). "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold tha the regulations on their face violate the Federal Constitution." *(California v. LaRue, supra,* pp. 118-119).

In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from

appearing bare-breasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restrictions on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting non-obscene topless dancing formances to willing customers under all circumstances.

Thus unlike the court in *LaRue,* we are not confronted with a broad attack on the facial validity of a statute which in "substance" prohibits acts of "gross sexuality," most of which are probably criminally obscene as well. Here the challenge narrowly focuses on a rule prohibiting a single activity, topless dancing, which is not inherently obscene. On the contrary it has been legally recognized as a form of expression (*Doran v. Salem Inn,* 422 US 922) like nudity in art and sculpture. Of course involving conduct, as it does, it is undoubtedly subject to more restrictions than the more static arts. But although offensive to some, as all nudity or partial nudity is, it is nevertheless entitled to at least minimal protection under the First Amendment. Certainly, the State could not prohibit topless dancing under all circumnstances (*Doran v. Salem Inn, supra*). Neither, in our view, may the State arbitrarily prohibit it at all places licensed to sell alcohol.[6]

Here there is nothing in the record to show that the State's conclusion, that this activity should not take place at licensed premises, was rationally based on evidence demonstrating a need for the rule. Indeed it appears that the law was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting

topless dancing subject to restrictions and the continued supervision of the State Liquor Authority.

The State urges however that we indulge an additional presumption and assume that the Legislature did investigate and find sufficient facts to support the legislation (see, *e.g., I.L.F.Y. Co. v. Temporary State Housing R. Com.*, 10 NY2d 263, 269; *Defiance Milk Products Co. v. DuMond*, 309 NY 537). But even if the presumption could be held to be equivalent to the actual findings made in *LaRue* – a question we need not decide – it would be inappropriate in this case to presume that topless dancing posed a problem in premises licensed by the State Liquor Authority. It is, in fact, hard to imagine that the agency, which is so vigilant in enforcing the liquor laws and its own regulations would have continued to permit topless dancing at premises authorized to sell liquor if the audiences degenerated into "bacchanalian revelries" *or* became involved in "incidents of legitimate concern" to the State. Notably, even in California where such incidents occurred in bars permitting gross sexuality, the State found no need to prohibit topless dancing. It simply imposed restrictions similar to those previously found acceptable by the State Liquor Authority in this State (see, *California v. LaRue*, 326 F. Supp. 348, 359).

The State's power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol. Thus when the State employs this power in such a way as to infringe on activities entitled to some constitutional protection, it must at least demonstrate that there is a rational connection between the activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption.[7] On the record before us there is

nothing which would rationally support a conclusion that in this State it is dangerous to mix alcohol and topless dancing.

Accordingly the judgment of the Supreme Court, Erie County, should be affirmed.

Gabrielli, J. (dissenting) — I am impelled to dissent, for the holding of the majority is based upon what I perceive to be a misstatement of the law as enunciated by the United States Supreme Court in *Doran v. Salem Inn, Inc.* (422 US 922) and *California v. LaRue* (409 US 109).

At issue on this appeal is the power of a State to prohibit topless dancing in an establishment which sells liquor for on premises consumption. The majority finds this prohibition to be unconstitutional, apparently premising this conclusion upon the belief that the State bears the burden of justifying the rationality of its ban upon topless dancing in drinking establihsments, because topless dancing is entitled to some First Amendment protections. The more recent pronouncements of the Supreme Court upon this subject, however, are expressly to the contrary (see *California v. LaRue, supra,* at 118-119; *Doran v. Salem Inn, Inc., supra,* at 932-933).

When a State acts to regulate the sale of liquor within its boundaries, its authority stems not merely from the normal police power of the State, but also directly from the Twenty-first Amendment to the United States Constitution. This grant of power by the Constitution serves to increase that authority which a State normally enjoys and to place a significantly greater burden upon a party seeking to challenge a State regulation of liquor as violative of some other provision of the United States Constitution.

This is not to suggest that a State acting under the authority of the Twenty-first Amendment is free to ignore all other parts of the Federal Constitution (see, *e.g.*, *Wisconsin v. Constantineau*, 400 US 433; *Craig v. Boren*, 429 US 190). Rather, the effect of the Twenty-first Amendment is to require those who would challenge a State Regulation of liquor on the ground that it is violative of some other Constitutional provision or of supreme Federal law, to prove that the particular interplay of provisions and purposes in each case mandates a disregard of the State's otherwise legitimate powers (compare *Hostetter v. Idlewild Liquor Corp.*, 377 US 324, *Segram & Sons v. Hostetter*, 384 US 35, and *State Board v. Young's Markert Co.*, 299 US 59, with *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 48 USLW 4238. – US –).

In the instant case, plaintiffs claim that the ban on topless dancing in establishments which sell liquor for on premises consumption is violative of the First Amendment. It is, of course, far too late in the day to suggest that dancing, even topless or nude dancing, is entitled to absolutely no First Amendment protections. Indeed, in both *California v. LaRue (supra*, 409 US at 118) and *Doran v. Salem Inn, Inc. (supra*, 422 US at 932) the Supreme Court specifically recognized that such "entertainment" is not bereft of all protection because it does have some communicative aspects. At the same time, however, the Court noted, with care, that such "art" forms "involve only the barest minimum of protected expression" (*Doran v. Salem Inn, Inc., supra*, 422 US at 932; accord, *California v. LaRue, supra*, 409 US at 117-118).

Because topless barroom dancing has so little communicative content and is accordingly entitled to only a

minimum of First Amendment protection, whereas the State has the responsibility and, under the Twenty-first Amendment, the power to regulate the sale and use of liquors, the Supreme Court has declared not only that a statute prohibiting or limiting such barroom dancing must be upheld unless it is clearly irrational, but also that the burden is on the challenger of such a law to overcome a presumption of constitutionality and prove that the law is irrational (*Califonira v. LaRue, supra,* 409 US at 118-119). Indeed, in *Doran v. Salem Inn, Inc.*, the Court expressly stated that "[i]n *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program" (*supra,* 422 US at 932-933). Moreover, and of great significance, in that same opinion, the Court intimated that the ban on topless dancing there involved would clearly have been constitutional had it been enacted pursuant to the State's powers under the Twenty-first Amendment and accordingly limited to establishments selling liquor (*Doran v. Salem Inn, Inc., supra,* 422 US at 933).

Applying these principles to the instant case, it is painfully obvious that the challenged statute is indeed valid and constitutional. Clearly, plaintiffs have not met their burden of proving this particular exercise of the State's power to regulate the sale of liquors to be irrational. Indeed, even the majority of this Court appears to have impliedly conceded that plaintiffs have failed to meet this burden since, in order to declare the statute unconstitutional, the majority was forced to place the burden of proving the statute's reasonableness upn the State, in direct contradiction to the doctrine enunciated in *LaRue.*

Moreover, since this statute does contain the very limitations which the Supreme Court indicated would have sufficed to place the ordinance at issue in *Doran* beyond challenge. I find it impossible to concur in the result reached by a majority of this Court today.

In conclusion, I must emphasize that judges called upon to determine the constitutionality of a challenged statute are required to set aside their personal opinions of what is best and strive "to resolve the issue by constitutional measurement, free of emotion of predilection" (*Roe v. Wade*, 410 US 113, 116). This is so for the very basic reason that "the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution" (*Lochner v. New York*, 198 US 45, 76 [Holmes, J., dissenting]). In his official capacity, a judge may serve neither as a moralist nor as a libertine, but simply must endeavor to decide each case on the bsis of the applicable law. Thus, whatever artistic or communicative value may attach to topless dancing is here overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. No reasonable person, moralist or not, could deny that the admixture of alcohol and topless dancing presents a very real possibility of disturbances of the public peace in licensed premises, a problem which may be addressed in advance by the Legislature. The elected representatives of the people of this State have now chosen to avoid such disturbances by means of a reasonable restriction upon etablishments which sell liquor for on premises consumption. Although some may believe this solution to be unwise or unnecessary, there exists no justification for disturbing the legislative judgment in this case.

Accordingly, I dissent and vote to reverse the judgment

appealed from and to declare the statute to be constitutional.

* * *

Judgment affirmed, with costs. Opinion by *Wachtler, J.* All concur except *Gabrielli, J.*, who dissents and votes to reverse in an opinion in which *Cooke, Ch. J.*, and *Jasen, J.*, concur.

NY Ct App; *Bellanca v. New York State Liquor Authority*, 6/23/80.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-8174-CIV-JCP

PURE & PRETTY, INC., a Florida corporation,

Plaintiff,

vs.

CITY OF RIVIERA BEACH, FLORIDA, a municipal corporation; G. NIKOLITS, C. GUIDER, C. TOLBERT, R. DODD, and C. LAWRENCE, individually and as members of the City Council of Riviera Beach, Florida; and WILLIAM "BOONE" DARDEN, individually and as Police Chief of Riviera Beach, Florida,

Defendants.

MEMORANDUM OF DECISION

This cause came to be heard on an emergency basis by the Honorable Alcee L. Hastings, United States District Judge for this District, on June 5, 1980 on the Plaintiff's application for a temporary restraining order and preliminary injunction prohibiting the Defendants, their officers, employes or agents from enforcing or making arrests pursuant to Ordinance No. 2066 of Riviera Beach, Florida. Counsel for Plaintiff and Defendants were present. From the evidence adduced the Court finds that the Plaintiff's business will be irreparably harmed if the

restraining order is not granted. The city manager testified that the Plaintiff's business, which is the only establishment so affected by Ordinance No. 2066, would be subject to the penalties so provided therein. Under the circumstances, the injurious effect of the ordinance to the Plaintiff outweighs the possible harm to the Defendants. In fact, there was no evidence shown that any substantial detriment to the public interest will be occasioned by granting the relief requested by the plaintiff. When questioned by the Court, Defendants waived the posting of bond.

The instant ordinance proscribes all forms of nudity without regard to their character as obscenity. Since the ordinance is so broadly drawn, it is likely that the ordinance covers conduct which enjoys certain protection under the First Amendment of the United States Constitution, see *Doran v. Salem Inn*, 1975, 422 U.S. 922, *California v. LaRue*, 1972, 409 U.S. 109. For that reason, a sufficient showing of merit has been made by the Plaintiff to justify granting the relief it seeks.

The Court notes the extensive oral, unpublished opinion of the Honorable Joe Eaton in the case of *500 Via de Palmas Corp. v. McCutcheon*, Case No. 78-8391-CIV-JE. There Judge Eaton held that a large number of sections in a Boca Raton ordinance, similar in many respects to the instant ordinance, were unconstitutional violations of a person's First and Fourteenth Amendment right. Judge Eaton also held that a municipality or county does not, unless conferred specifically by the State, have the delegated authority to regulate business such as the Plaintiff's using the Twenty-first Amendment as a basis for the enforcement or enactment of the ordinance in question.

This Court is well aware that the final resolution of

Plaintiff's claim is dependent upon a factual determination and balancing of two sometimes conflicting intersts; the public necessity for such an ordinance and the extent to which it infringes on Plaintiff's First Amendment rights of expression.

Being otherwise duly advised in the premises the Court does hereby

ORDER AND ADJUDGE that the Defendants, their officers, employees or agents are temporarily restrained and enjoined from enforcing Ordinance No. 2066 enacted by the City of Riviera Beach, Florida, until such time as the claims raised by the Plaintiff are fully adjudicated or until further Order of Court. Plaintiff is not required to post bond in this regard.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of June, 1980.

/s/ Alcee L. Hastings
ALCEE L. HASTINS
United States District Judge

Copies furnished counsel.